(2A)

No. 96-779-CFX
Status: GRANTED

Title: Arkansas Educational Television Commission, Petitioner
v.
Ralph P. Forbes

Docketed:
November 19, 1996

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Marks,Richard D.

Counsel for respondent: Shackelford,Kelly J.

Entry	Date	Note	Proceedings and Orders
1	Nov 19 1996	G	Petition for writ of certiorari filed. (Response due December 19, 1996)
3	Dec 18 1996		Brief amici curiae of Association of America's Public Television Stations, et al. filed.
2	Dec 19 1996		Brief amici curiae of Federal Communications Commission and United States filed.
4	Dec 30 1996		DISTRIBUTED. January 17, 1997 (Page 5)
5	Jan 13 1997	F	Response requested -- JPS.
6	Feb 12 1997		Brief of respondent Ralph Forbes in opposition filed.
7	Feb 21 1997		Reply brief of petitioner Arkansas Educational Television Commission filed.
8	Feb 26 1997		REDISTRIBUTED. March 14, 1997 (Page 14)
9	Mar 17 1997		Petition GRANTED. SET FOR ARGUMENT October 8, 1997. **********
11	Mar 26 1997		Order extending time to file brief of petitioner on the merits until May 30, 1997.
12	Apr 30 1997		Joint appendix filed.
13	May 30 1997		Brief of petitioner Arkansas Educatioinal Television Commission filed.
14	May 30 1997		Brief amici curiae of Association of America's Public Television Stations, et al. filed.
15	May 30 1997		Brief amici curiae of California, et al. filed.
16	May 30 1997		Brief amicus curiae of City of New York filed.
17	May 30 1997		Brief amicus curiae of New Jersey filed.
18	May 30 1997		Brief amici curiae of Federal Communications Commission and the United States filed.
19	May 30 1997		Brief amicus curiae of Commission on Presidential Debates filed.
25	Jun 11 1997		Brief amici curiae of Eugene McCarthy and Larry Agran filed.
20	Jun 17 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Jun 27 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: petitioner - 25 minutes; respondent - 25 minutes; the Acting Solicitor General - 10 minutes.
23	Jun 27 1997		Brief amici curiae of ACLU and ACLU of Arkansas filed.
22	Jun 30 1997		Brief amicus curiae of Perot '96 filed.
26	Jun 30 1997		Brief amicus curiae of Greens/Green Party USA filed.

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Entry	Date	Note	Proceedings and Orders
28	Jul 1 1997		Brief amicus curiae of Pacific Legal Foundation filed.
24	Jul 2 1997		Brief of respondent Ralph Forbes filed.
27	Jul 2 1997		Brief amicus curiae of Brennan Center for Justice at NY University School of Law filed.
32	Jul 2 1997		Brief amicus curiae of Natural Law Party of the United States filed.
29	Aug 1 1997		Reply brief of petitioner Arkansas Educational Television Commission filed.
30	Aug 15 1997		CIRCULATED.
31	Aug 17 1997		Record filed.
		*	Original record proceedings United States District Court for the Western District of Arkansas (BOX).
33	Aug 18 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.

Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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November 19, 1996

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QUESTIONS PRESENTED

The Arkansas Educational Television Commission ("AETC") holds licenses from the Federal Communications Commission ("FCC") for the five noncommercial, educational ("public") television stations that comprise the Arkansas Educational Television Network ("AETN").

1. Whether a debate between political candidates, organized and broadcast by a state public television network, is a limited public forum (as the Eighth Circuit held below) or a non-public forum, as the Eleventh Circuit has held in direct reliance on this Court's public forum cases?

2. Whether the First Amendment protects the editorial judgments of a state public television network that, free from political interference, applies rational, viewpoint-neutral policies in making journalistic decisions to shape the debate (including the selection of participating candidates), as the Eleventh Circuit has held in direct conflict with the Eighth Circuit's judgment below?

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The Arkansas Educational Television Commission respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App. 1a) is reported at 93 F.3d 497 (8th Cir. 1996). The United States District Court for the Western District of Arkansas did not render an opinion after the jury verdict in this case.

JURISDICTION

The Eighth Circuit entered its judgment on August 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the district court was invoked under the First Amendment to the United States Constitution and 28 U.S.C. §1331 (general federal question jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

Sections of the Arkansas Code Annotated, ARK. CODE ANN. §§ 6-3-101-113, 25-16-804; the First Amendment to the United States Constitution; the Communications Act of 1934, as amended, Sections 3(h), 309(a), 312(a)(7), 315(a), and 402(a) (codified at 47 U.S.C. §§ 153(h), 309(a), 312(a)(7), 315(a), and 402(a) (1996)); and the rules of the Federal Communications Commission, 47 C.F.R. §§ 73.1941, 73.1944, are found in the Appendix.

STATEMENT OF THE CASE

In the summer of 1992, the Arkansas Educational Television Network ("AETN" or the "Network"), with help from the Associated Press, began planning to broadcast political debates to cover each of that fall's five races for U.S. House and the race for the U.S. Senate in Arkansas. AETN's purpose in trying to arrange these debates was to serve AETN's viewers (Trial Transcript ["Tr. Trans."] 198-201, 207-208). AETN made the editorial decision to invite to each debate only the Republican and Democratic candidates.

A. The Arkansas Educational Television Commission

Petitioner Arkansas Educational Television Commission ("AETC") is an agency of the State of Arkansas, created to make the benefits of educational television available to the people of Arkansas. AETC operates the Network, five interconnected noncommercial educational television stations licensed to AETC by the Federal Communications Commission ("FCC").

AETC's eight members are appointed by the Governor of Arkansas with advice and consent of the state Senate. Except for educators in the state's public schools or institutions of higher learning, the members may not hold any other state or federal office, nor hold employment paid in whole or part by funds derived from tax sources. The members serve eight year terms and may be removed only for good cause. AETC's and AETN's Executive Director is Susan Howarth.

B. Procedural History

By letter dated August 24, 1992 to Susan Howarth, Respondent Ralph P. Forbes notified AETN that he was an independent candidate for U.S. Representative from the Third District of Arkansas, and requested to be included on equal terms in the debate between his opponents (App 105a). On September 4, 1992, Ms. Howarth responded by letter ("Howarth Letter," App 103a), stating that, under Section 315(a) of the Communications Act, 47 U.S.C. §315(a), as interpreted by the FCC and the courts, debates were exempt from equal opportunities, and that in AETN's bona fide journalistic judgment its viewers would best be served by inviting only nominees of the two major parties (Tr. Trans. 207).

On October 19, 1992, three days before the debate, Forbes sued AETC, its members, its Executive Director, certain AETN staff (collectively, the "AETN Defendants") and others in the United States District Court for the Western District of Arkansas. He alleged that, because he was qualified for the ballot as an independent candidate, he had a right to be included in the debate. Forbes alleged that AETN's decision not to invite him violated the Civil Rights Act, 42 U.S.C. §1981 *et seq.*, and his First Amendment rights. He sought declaratory and injunctive relief and compensatory and punitive damages.

Forbes' motion for a preliminary injunction to force his inclusion in the debate was denied by the District Court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of the Eighth Circuit denied Forbes' request for an injunction pending appeal (App. 45a, 43a). The court based its decision in part on *DeYoung v. Patten*, 898 F.2d 628, 632-33 (8th Cir.

1990), which held that a state-owned public television network (the Iowa Public Television Network) is not a public forum for First Amendment purposes, and that candidates do not have a First Amendment right to appear in political debates on a state-owned public television station (App. 46a, 44a). The debate was broadcast without Forbes' participation on October 22, 1992.

One week after the election, the AETN Defendants filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). The District Court granted the motion and dismissed the complaint on December 16, 1992.

An Eighth Circuit panel denied Forbes' request for rehearing on the issue of preliminary relief on December 22, 1992. On April 28, 1994, the Eighth Circuit, *en banc*, affirmed in part and reversed in part the District Court's decision granting the AETN Defendants' motion to dismiss. *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 500 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes) ("*Forbes I*") (App. 25a). The Court reversed on Forbes' First Amendment claim, holding that, "Forbes did allege a First Amendment violation well enough to survive a motion to dismiss." *Id.* at 1428 (App.32a). Further, the Court overruled the earlier Eighth Circuit panel decision in *DeYoung v. Patten*, holding that the panel in that case wrongly decided the First Amendment question of whether a candidate had a First Amendment right of access to appear on a state-owned public television facility. However, the Court left open whether AETN's debate was a limited public forum or a non-public forum. *Forbes I*, 22 F.3d at 1429 (App. 35a).

On September 16, 1994, the AETN Defendants filed with this Court a petition for a writ of certiorari, which was denied on November 7, 1994. On September 19, 1994, Forbes filed a petition for a writ of certiorari, which was denied on May 15, 1995.

Trial began on Forbes' First Amendment claim on June 5, 1995. Forbes admitted that his campaign did not generate any public support or media coverage, and that he raised little money, had no campaign staff, and no campaign headquarters (Tr. Trans. 147-53). He admitted that he drew no crowds and no interest from the press or the public (Tr. Trans. 153-55, 172-3)

Uncontradicted evidence showed that AETN at all times intended to maintain control over all its programming, in order to satisfy the FCC's policies and the requirements of the Communications Act. AETC adopted the *Statement of Principles of Editorial Integrity in Public Broadcasting* ("Editorial Integrity Principles") (App. 64a, 82a) and the "Programming Policy Statement for AETN" ("AETN Programming Policy") (App. 96a) to govern AETN's editorial decision-making (Tr. Trans. 186-192, 193-197). It is also uncontroverted that AETN intended the debate to be exempt from equal opportunities as "on-the-spot coverage of a bona fide news event" under Section 315(a)(4) of the Communications Act, 47 U.S.C. §315(a)(4) (Howarth Letter, App. 103a). The evidence shows that AETN therefore included participants in the debate on the basis of their potential interest and importance to viewers (Tr. Trans. 198-99, 201, 206-07), rather than to advance any candidacy. That is, AETN designed the debate to serve its viewers (Tr. Trans. 198-201, 207-208).

Uncontradicted evidence also showed that AETN analyzed Forbes' lack of public support and absence of press coverage, and the very low likelihood that Forbes would win the election, in determining that Forbes was not a serious candidate (Tr. Trans. 199-202, 207-208, 212-214, 296, 300-301). AETN's editors concluded that viewers in the Third District would not be interested in Forbes' participation, that his presence would detract from the time available for the candidates whose campaigns had generated a significant public response, and therefore that Forbes should not be invited to the debate. *Id.* In addition, the evidence showed that AETN would have given Forbes "reasonable access" to appear on AETN under Section 312(a)(7) of the Communications Act, 47 U.S.C. §312(A)(7), if he had requested it, but that Forbes never did so (Tr. Trans. 157-167, 203-205, 351-352, 355-56).

The District Court instructed the jury that the congressional debate was a non-public forum as a matter of law. On June 7, 1995, the jury returned a special verdict in favor of the AETN Defendants, finding that (1) AETN's decision not to invite Forbes to the debate was not influenced in any way by political pressure, and (2) the decision was not made because of AETN's objections or opposition to Forbes' views (App. 22a, 23a). The District Court entered judgment in favor of the AETN Defendants on June 7, 1995 (App. 21a).

Forbes appealed, claiming, among other things, that the debate was a limited public forum, rather than a non-public forum. On August 21, 1996, a panel of the Eighth Circuit reversed the District Court's decision. *Forbes v. Arkansas Educ. Television Comm'n.*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*") (App. 1a). The Eighth Circuit held that the debate was a limited public forum because, "AETN, by

staging the debate, opened its facilities to a particular group — candidates running for the Third District Congressional seat." *Id.* at 504 (App. 14a-15a). The Eighth Circuit also held that, because the debate was a limited public forum, AETN's reason for excluding Forbes — that Forbes was not a "viable" candidate, in the term used by the Court — was not legally sufficient. *Id.* at 505 (App. 17a). The Eighth Circuit held:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. . . . But . . . the people making this judgment were not ordinary journalists: they were employees of government. . . . A journalist employed by the government is still a government employee.

Id. (App. 16a-17a)

The Eighth Circuit concluded that AETN's debate was a limited public forum because it "was staged in order for the candidates to express their views on campaign issues," 93 F.3d at 504 (App. 15a), which the Eighth Circuit distinguished on that basis from the forums in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985), and *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). *Forbes II*, 93 F. 3d at 504 (App. 15a).

After holding that the debate was a limited public forum rather than a non-public forum, the Eighth Circuit said: "The debate was surely a place opened by the government for a limited class of speakers. What was that class?" *Id.* at 504 (App. 15a). The Eighth Circuit answered that question this way:

> Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation.

Id.

On August 30, 1996, the AETN defendants filed with the Eighth Circuit a Motion for Stay of Mandate Pending Petition for Certiorari. On September 25, 1996, the AETN defendants filed with Justice Thomas an Application to Stay Enforcement of Judgment Pending Filing of Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. That application was denied. On September 26, 1996, the Eighth Circuit denied the motion to stay its mandate, but issued a short order stating that *Forbes II* did not prevent AETN from covering debates organized by entities other than AETN, and that *Forbes II* did not apply to write-in candidates (App. 19a).

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision That A Debate On A State-Owned Public Television Station Is A Limited Public Forum Misapplies This Court's Forum Analysis, In Conflict With Decisions Of The Eleventh Circuit And This Court.

Forbes II conflicts with *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991), where the Eleventh Circuit held that the decision not to invite the Libertarian candidates for governor and lieutenant governor of Georgia to a debate initiated and broadcast by the Georgia Public Telecommunications Commission ("GPTC") did not violate the First Amendment. 917 F.2d at 488 & n.2. The Eleventh Circuit applied the forum analysis from *Cornelius* in holding that the debate in *Chandler* was a non-public forum. *Id.* at 488-89.

This is a fresh conflict. It was created by the Eighth Circuit's *en banc* decision in *Forbes I* to overrule the holding in *DeYoung*, 898 F.2d at 633, that a state-entity public broadcaster is not a public forum.

This conflict is important because approximately two-thirds of the public television stations in the United States are licensed to state entities.[1/] If every program to which a

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1/ In *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984), this Court recognized that "[t]he vast majority of financial support [for public broadcasting] comes . . . from state and local governments," 468 U.S. at 390 n.19, and that "at least two-thirds" of public television stations are licensed

(continued...)

viewer seeks access on these stations is held to be a limited public forum under *Forbes II*, any editorial decision can be challenged in federal district court. The station then must show that its journalistic or artistic decision is narrowly tailored to meet a compelling governmental interest. No broadcaster can operate if it can be forced continually to prove that its editorial decisions meet this standard, because:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors — newspaper or broadcast — can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 124-25 (1973) ("*CBS v. DNC*").

State-entity public broadcasters will especially be beset by demands from candidates who, like Mr. Forbes, are able to gain a place on the ballot simply by gathering a small number of signatures. (Mr. Forbes needed no more than 2,000 signatures. *Forbes II*, 93 F.3d at 500.) Under the rule of *Forbes II*, these broadcasters will have no way to resist the demands of myriad fringe candidates. The *Chandler* court recognized this danger:

> Were we to hold that such an invitation is required by the Constitution, we could see no principled basis upon which that rule could be

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1/ (...continued)
to states or state-related entities, *Id.* at 394 n.22.

> limited to the candidate who has obtained a ballot position and not extended to all other serious candidates.

Chandler, 917 F.2d at 489. Consequently, state-entity licensees will be forced to discontinue sponsorship of political debates, despite the fact the these debates are a significant public service of noncommercial stations.[2/] This is not a hypothetical fear. Because of the *Forbes II* ruling, the Nebraska Educational Telecommunications Network canceled a debate, scheduled for August 25, 1996 between the Democratic and Republican senatorial candidates, because of demands by less newsworthy candidates to be included.[3/] The effect of *Forbes II* is thus to curtail political speech by denying state-entity public broadcasters protection

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2/ The FCC considers political debates to be of great public service value, as its decisions illustrate. *See Chisholm v. FCC*, 538 F.2d 349, 359 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976) (upholding FCC ruling that broadcast of candidates' debates was exempt from "equal opportunities" as "on-the-spot coverage" if the decision to cover it was based on *the broadcaster's good faith, reasonable news judgement*, and not because the broadcaster sought to advance a particular candidacy); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd, mem., League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984) (scope of the "on-the-spot" coverage exemption expanded to include debates organized by broadcasters and held in broadcast studios).

3/ Don Walton, *Senate Debate At Fair Canceled, Lincoln Journal Star*, Aug. 24, 1996 at 1A; *Name On Ballot Not Enough To Qualify For Political Debate* (editorial), *Lincoln Journal Star*, Aug. 27, 1996, at 4B.

from legal challenges to their editorial decisions. The First Amendment does not demand this rigid interpretation.

In *Chandler*, the Eleventh Circuit followed the analytical path mapped out in *Cornelius*, holding that content-based decisions by GPTC do not violate the First Amendment:

> GPTC makes content-based decisions on a regular basis . . . to serve Georgians. A decision to air any show is necessarily content-based. GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. *Such a decision promoted GPTC's function*, was "reasonable" and was "not an effort to suppress expression merely because public officials oppose the speaker's views."

Chandler, 917 F.2d at 489 (*emphasis added*), *citing Cornelius*, 473 U.S. at 788, 800.

Cornelius prescribes the method for analyzing whether a forum is "limited" or "non-public." Although the Eighth Circuit followed *Cornelius* in holding that the relevant forum in this case is the debate rather than the entirety of AETN's programming (App. 12a-13a), *see Cornelius*, 473 U.S. at 800-01 ("[I]n defining the forum we have focused on the access sought by the speaker."), the Eighth Circuit departed sharply from *Cornelius's* injunction that:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the

> Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with [the] expressive activity to discern the government's intent. . . .
>
> We will not find that a public forum has been created in the face of clear evidence of a contrary intent. . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with the expressive activity.

Id., 473 U.S. at 802-03 (*citations omitted*).

The Eighth Circuit did not follow *Cornelius*. For example, the Eighth Circuit did not address uncontroverted evidence that AETN's editorial staff did in fact follow the Editorial Integrity Principles and the AETN Programming Policy in designing the debate format and choosing the debate participants according to journalistic criteria, as specified in those policies. The Eighth Circuit also did not address uncontroverted evidence that AETN's intent *never* included defining the class of debate invitees to be all legally qualified candidates for the Third District House seat, but instead only those candidates who had shown public support in their campaigns, who had a realistic chance of winning the election, and in whose views the television audience therefore would be interested (Tr. Trans. 199-202, 207-208, 212-214). The Eighth Circuit did not address uncontroverted evidence of the fact that AETN wanted the debate to be exempt from equal opportunities under Section 315 (*see*

Howarth Letter, App. 103a, Tr. Trans. 231), or that the debate would not qualify for that exemption if AETN sponsored the debate for the purpose of advancing any candidacy.

In sum, there is not a whit of evidence that AETN ever intended the debate to be open to all candidates for the Third District House seat. *Rather, all the evidence shows AETN intended to open the debate only to those candidates whose campaigns were generating public support and who therefore were of interest to the viewers of the Third District* (Tr. Trans. 198-99). As the debate's producer, Amy Oliver, testified, AETN's overriding criterion was "viewer need and interest" (*Id.* at 307). AETN met this test by inviting only those candidates whose campaigns demonstrated public support, as judged by a several journalistic factors (*Id.* at 210-14, 328).

For example, Ms. Oliver assessed a number of "indicators" (*Id.* at 304) of newsworthiness (*Id.* at 306-07), including the candidates' performances in past elections (*Id.* at 304). Ms. Oliver considered the kind of press coverage Mr. Forbes was receiving, whether he was appearing at rallies, whether he was receiving invitations to speak, whether he was successful in raising money (he had raised less than $10,000 for the race), whether he was appearing in public places such as courthouse squares, whether Mr. Forbes was really a "challenger," his record in previous elections, and the opinions of other journalists in Arkansas who were covering the election in the Third District (*Id.* at 295, 298-99, 302, 328, 341, 344). Ms. Oliver essentially assessed the newsworthiness of Mr. Forbes's candidacy (*Id.* at 202-03, 210-14, 257, 297-99, 306-07). She concluded that the people of Arkansas "did not want to hear" from Mr. Forbes (*Id.* at 331). Based on Ms. Oliver's

recommendations, Ms. Howarth, as AETN's editor-in-chief, made the decision not to invite Mr. Forbes (*Id.* at 184-85).

Ms. Oliver concluded that Mr. Forbes's participation would reduce the time available for debate between the two candidates in whose campaigns, and views, the public was interested (*Id.* at 201, 293, 345). Further, inviting Mr. Forbes to a appear with the candidates who were successful in attracting support would have given Forbes a status, and implied a degree of legitimacy for his candidacy, that he had not earned on the campaign trail (*Id.* at 201-02, 208). In Ms. Howarth's view, not inviting Mr. Forbes was a matter of fairness and balance, of adherence to the highest journalistic standards (*Id.* at 197).

AETN invited the Democratic and Republican party candidates to the debate because nomination by one of these parties "indicat[ed] a certain amount of popular support" (*Id.* at 269; *see also* 288-89). This contrasted with the fact that popular support for Mr. Forbes never materialized (*Id.* at 327-28).

The Eighth Circuit focused on the fact that AETN considered whether Mr. Forbes was likely to win the election or, in the words of the opinion below (but not of AETN's editors), whether Mr. Forbes was a "viable" candidate. AETN did indeed consider Mr. Forbes's chances of winning (*see, e.g.*, Tr. Trans. 341). However, the fact that Mr. Forbes was unlikely to win the election was only one of many factors that AETN analyzed (*see, e.g., Id.* at 328, 344-45).

Under *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984), the Eighth Circuit was obliged to "'make an independent examination of the *whole* record,'" *Id.* at 499

(*citation omitted, emphasis added*), because this is a case where a correct interpretation of the facts is intertwined with a correct application of *Cornelius*. In particular, this case turns on AETN's intent regarding the forum. However, the Eighth Circuit did not analyze most of the evidence concerning AETN's intent. Instead, the Eighth Circuit concentrated exclusively on the fact that AETN considered Mr. Forbes unlikely to win the election (App. 16a-17a), and failed to address the totality of factors AETN examined in deciding not to invite Mr. Forbes.

In the process, the Eighth Circuit overlooked the fact that AETN's intent was *never* to open the debate to all legally qualified candidates for the office in question, but only to those candidates whose campaigns were drawing support from the public. This omission of a "constitutional fact" necessary to the First Amendment analysis, *see Bose*, 466 U.S. at 508 n.27 (*citations omitted*), set the Eighth Circuit on an analytical path that is irreconcilable with *Cornelius*.

The Eighth Circuit's error is found in the steps it took to reach the conclusion that the debate was a limited public forum. The Eighth Circuit never analyzed whether AETN's intent to make the debate exempt (as "on-the-spot coverage of a bona fide news event") from equal opportunities under Section 315(a)(4) of the Communications Act, 47 U.S.C. § 315(a)(4) (*see* Howarth Letter, App. 103a, Tr. Trans. 230-31, 355), was relevant to determining the type of forum. Instead, the Eighth Circuit began with an inaccurate premise of "constitutional fact": "AETN, by staging the debate, opened its facilities to a particular group — candidates running for the Third District Congressional seat." *Forbes II*, 93 F.3d at 504 (App. 14a-15a). This premise is flatly contradicted by the consistent record evidence that AETN's

intent was *never* to open the debate to all these candidates, but just to those whose newsworthiness was demonstrated by significant popular support during the campaign.

Next, the Eighth Circuit sought to distinguish the debate from the Combined Federal Campaign ("CFC") in *Cornelius* and the school internal mail system in *Perry*. It said that the CFC was not created "'for purposes of providing a forum for expressive activity.'" *Forbes II*, 93 F.3d at 504 (quoting *Cornelius*, 473 U.S. at 805). The flaw in reliance on this single sentence is that it discards the surrounding analysis in *Cornelius* examining the nature of the government property and the use to which it is dedicated. In *Cornelius*, history did not support "a finding that the Government was motivated by an affirmative desire to provide an open forum for charitable solicitation . . . ." *Id.* Similarly, in *Forbes II*, the record does not support a finding that AETN was motivated by a desire to create an open forum for all Third District congressional candidates. Rather, the opposite is true: AETN sought to provide a forum closed to candidates who were not newsworthy, whose campaigns had not already generated public support and attendant press coverage.

Cornelius also directs courts to examine "the nature of the Government property involved" to see if there was a practice in limiting access, based on the purpose of the government activity for which the property is used. Here again the Eighth Circuit's independent review passed over "constitutional facts" in the record regarding the nature of AETN as a broadcast operation licensed by the FCC.

The *sine qua non* of a broadcast licensee is the legal capacity to exercise unfettered editorial judgment over

programming.[4/] When licensees have failed to retain control over programming, the FCC has denied license renewal.[5/] The requirement for control over programming applies fully to noncommercial licensees.[6/] Without this capacity, the programming decisions of state public broadcasters nationwide would be vulnerable to constant legal attack in federal court.[7/]

The Editorial Integrity Policy (App. 64a, 82a) and the Programming Policy Statement for AETN (App. 96a) were adopted so that AETN would operate in all respects as an institution of the broadcast press, maintaining control over

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4/ *National Broad. Co., Inc. v. United States*, 319 U.S. 190, 218 (1943); *Cosmopolitan Broad. Co., Inc. v. FCC*, 581 F.2d 917, 921 (D.C.Cir. 1978); *United States Broad. Corp.*, 2 F.C.C.2d 208, 225 (1935).

5/ *E.g., Cosmopolitan Broad. Corp.*, 59 F.C.C.2d 558 (1976), *recons. denied*, 61 F.C.C.2d 257 (1975), *rev'd on other grounds, Cosmopolitan Broad. Corp. v. FCC*, 581 F.2d 917 (D.C.Cir. 1978).

6/ *E.g., Alabama Educ. Television Comm'n*, 33 F.C.C.2d 495, 508 (1972), *modified*, 50 F.C.C.2d 461 (1975); *Trustees of the Univ. of Pennsylvania (WXPN)*, 69 F.C.C.2d 1394, 1420 (1978); *Southwest Texas Pub. Broad. Council*, 85 F.C.C.2d 713 (1984).

7/ *See Aldrich v. Knab*, 858 F. Supp. 1480 (W.D. Wash. 1994), *reversed on other grounds (Eleventh Amendment)*, 36 F.3d 1102 (9th Cir. 1994) (Challenge, not involving political candidates, to exercise of programming judgment at noncommercial radio station licensed to University of Washington).

all programming according to the policies of the FCC. *See generally Barnard v. Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) (state bar publication is non-public forum, and plaintiff has no right of access to publish there); *Estiverne v. Louisiana State Bar Association*, 863 F.2d 371 (5th Cir. 1989) (same); *Avins v. Rutgers*, 385 F.2d 151 (3rd Cir. 1967), *cert. denied*, 88 S.Ct. 855 (1967) (refusal of state university law review editors to accept for publication law review article did not violate plaintiff's First Amendment rights); *Bazaar v. Fortune*, 476 F.2d 570 (5th Cir. 1973), *aff'd en banc*, 489 F.2d 225, *cert. denied*, 416 U.S. 995 (1973) (First Amendment violated when state university attempted to censor student literary magazine); W. Canby, "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 *Texas L. Rev.* 1123 (1974). This is comparable to the "'wide discretion and control'" that government "'must have'" in the federal workplace, *Cornelius*, 473 U.S. at 805, because maintaining editorial control, especially in news programming such as debates, is essential to being a broadcast licensee.

No person has a First Amendment right of access to appear on news programs on broadcast stations licensed to non-state entities. The Communications Act's regulatory scheme is built around licensee control of program content:

> The legislative history of the [Act] reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with — and firmly rejected — the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues.

CBS v. DNC, 412 U.S. at 104-105 (citation omitted). Because the function of a broadcast licensee is to exercise editorial control, the Eleventh Circuit in *Chandler* held that GPTC's exercise of editorial control over participants in a congressional candidates' debate was wholly consistent with GPTC's function under *Cornelius*. *Chandler*, 917 F.2d at 489. This analysis of the government function of a broadcaster operating within the framework of the Communications Act is missing from the Eighth Circuit's reliance, in isolation, on the single sentence from *Cornelius* that the CFC was not created for purposes of expressive activity.

Similarly, the Eighth Circuit is unsuccessful in distinguishing *Perry* when it asserts that access to the internal school mail system in *Perry* "was designed solely for expression relating to school business" and "was granted to groups on an individual basis and was not "'granted as a matter of course to any particular group.'" *Forbes II*, 93 F.3d at 504 (App. 15a). The mail system in *Perry* is analogous to the candidate debates on AETN, because the debates were designed solely to serve AETN's viewers, and were therefore open only to newsworthy candidates (as judged by AETN's editors). The Eighth Circuit's conclusion from *Perry* that the debate "was staged [by AETN] in order for the candidates to express their views on campaign issues," *Forbes II*, 93 F.3d at 505 (App. 15a), thus fails to account for the nature of the forum in *Perry* and the "constitutional facts" from the record about AETN's intent in organizing the debate.

Nowhere is the departure from *Cornelius* clearer than in this part of the Eighth Circuit's opinion:

> The debate was surely a place opened by the government for a limited class of speakers. What was that class?. . . .Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation.

Forbes II, 93 F.3d at 504 (App. 15a). However, there is no naturally occurring class of speakers who are protected by the First Amendment under *Cornelius*, any more than there was a naturally occurring class of potential CFC participants to be protected in *Cornelius* itself.[8/] The candidates whose campaigns are drawing public support, who have been successful in raising funds, drawing crowds, and garnering unabated press coverage, are as "natural" a "class" for purposes of the debate — a bona fide news event — as is the group of all legally qualified candidates for the particular office. So the Eighth Circuit's conclusion as to the nature of the forum is a sharp turn away from this Court's controlling precedent, as well as from *Chandler*.

The Eighth Circuit's departure from the forum analysis required under *Cornelius* improperly diminishes the editorial rights of all state-entity broadcast licensees in the Eighth Circuit. In practice, it will burden state-entity licensees' decisions about whether to hold candidates' debates, and

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8/ The Eighth Circuit in fact revised its judgment in *Forbes II* to exclude from the class both write-in candidates and candidates in debates covered, but not organized, by AETN (App. 19a). This demonstrates the elusiveness of the concept of a natural class of debate participants, particularly when so many televised political debates involve only the most newsworthy candidates.

about whether to try to exclude candidates who are not newsworthy. For these reasons, the decision below should be reviewed by this Court.

II. Contrary To The Eighth Circuit's Decision, Even If A Debate On A State-Owned Public Television Station Is A Limited Public Forum, AETN's Editorial Judgment Did Not Violate Forbes' First Amendment Rights.

Both the Fifth and Eleventh Circuits have turned aside First Amendment challenges to the legal capacity of state-entity public broadcasters to make editorial decisions. *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) (public television viewers cannot force state public broadcast licensees in Alabama and Texas to air a particular program); *Schneider v. Indian River Community College Found.*, 875 F.2d 1537 (11th Cir. 1989) (attacks by former station staff members against editorial policies of the licensee, a community college board, held not to state a First Amendment claim); *see also Community-Serv. Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978).

The Fifth Circuit, in *Muir*, and the Eleventh Circuit, in *Schneider*, considered at length the First Amendment and equal protection dilemma posed by state public broadcasting licensees. *See Chandler*, 917 F.2d at 488 & n.3. Both were relied upon in *Chandler* for guidance as to the "the extent of discretion a public broadcast licensee can exercise consistent with the First Amendment." *Id.* at n.3. All three cases rely on Judge Rubin's view:

> Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of access of those who seek exposure, and the rights of viewers, as well as the prerogatives of the licensee itself as a state agency, are at least in large part determined by this mission.

Muir, 688 F.2d at 1049. In *Chandler*, the Eleventh Circuit analyzed GPTC in Judge Rubin's framework:

> GPTC is "created, designed, and intended for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." . . . Further, as a public television station, GPTC is under an obligation to serve the public interest. [ ] GPTC's employees make editorial decisions on a daily basis determining which programs to air in order to meet the needs and interests of Georgia's citizens. Obviously a decision to broadcast one program excludes, for that time, all other programs.

917 F.2d at 488 (references and footnote omitted).

AETC fits this mold. AETC's mission is to "[make] the benefits of educational television available to and [promote] its use by inhabitants of Arkansas," and for that purpose AETC is "charged with the duty of controlling and

supervising the use of channels reserved by the [FCC] to Arkansas for noncommercial educational use."[9/]

In its forum analysis of the debate, the Eighth Circuit did not address AETC's adoption of the Editorial Integrity Principles and the AETN Programming Policy, the two policies that govern AETN's editorial decision-making and require AETN to maintain control over all its programming (App. 82a, 96a). For example, the Eighth Circuit did not discuss the relevance of these policies, under *Cornelius*, 473 U.S. at 806, to the determination of the type of forum that AETN intended to create when it scheduled the debate, or to the legitimacy under *Cornelius* of AETN's editorial decisions about the debate.

These policies are important evidence of AETC's intent to establish AETN as an institution of the press, operating according to the same journalistic standards as privately owned entities of the broadcast press (App. 82a, 96a). The Editorial Integrity Principles and the AETN Programming Policy also evidence AETN's intent that every one of its programs will be a non-public forum, and show in any event that the policies require AETN to maintain editorial control at all times (App. 82a, 96a).[10/]

9/ ARK. CODE ANN. §§ 6-3-105(a),(c) (Michie 1993) (App. 50a).

10/ AETC's adoption of these rational, viewpoint-neutral policies also satisfies the rule in *Cornelius*, 473 U.S. at 812, that, "there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored . . . ." The policies are consistent with *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 392-3 (continued...)

The central import of these policies is reinforced by the list of factors Ms. Oliver considered before recommending to Ms. Howarth that Mr. Forbes was not newsworthy and that he should not be invited to the debate. The integrity of AETN's journalistic process is bolstered by the jury's specific findings, in response to the special verdict interrogatories, that no political pressure was exerted on AETN and that Mr. Forbes' views were not a factor in Ms. Oliver's recommendation or Ms. Howarth's decision.

Yet, if the Eighth Circuit's approach is controlling, AETC may no longer have the legal capacity either to comply with its organic statute or to fulfill the most basic licensing requirement of the FCC, namely, to control its programming via the exercise of programming discretion.[11/]

10/ (...continued)
(1993) (analyzing *Cornelius's* approval of governmental control over access to a non-public forum if the restrictions are reasonable in light of the forum's purpose and viewpoint-neutral), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510, 2516-17 (1995) (discussing "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created"). The application of these viewpoint-neutral programming policies in the editorial process used to evaluate Mr. Forbes' request to participate in the debate (combined with the jury's special verdict that no political pressure affected the application of these policies) demonstrates that, in policy and practice, AETN operates consistently with *Cornelius*.

11/ The FCC has licensed hundreds of public radio and television stations to state entities on the assumption that (continued...)

If, for every programming determination that is challenged by a disgruntled viewer, listener, or candidate, state licensees must appear in federal court to prove that their editorial decisions serve a compelling governmental need and are narrowly tailored, the practical effect will be to mire programming and journalistic processes beyond use.

This was precisely the problem perceived by the Fifth Circuit in holding that state public television licensees in Alabama and Texas were not under a First Amendment obligation to carry the program, "Death of a Princess." In the opinion which is the law of the Fifth and Eleventh Circuits, *Schneider*, 875 F.2d at 1541 and n.2, Judge Rubin reasoned:

> Judicial reassessment of the propriety of a programming decision made in operating a television station involves not only interference with station management but also reevaluation of all of the content-quality-audience reaction factors that enter into a decision to use or not to use a program by a medium that cannot possibly, by its very nature, accommodate everything that every viewer might desire.

Muir, 688 F.2d at 1052 (Rubin, J., concurring).

Similarly, in *Schneider*, where the Eleventh Circuit considered attacks by former station staff members against

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11/ (...continued)
state-entity licensees have the legal capacity to exercise independent editorial judgment. *Forbes I* and *Forbes II* undermine this assumption.

the editorial policies of the licensee, a community college board, the court declared:

> It is clear that Congress concluded that the First Amendment rights of public television viewers and radio listeners are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest.

875 F.2d at 1541.

The D.C. Circuit perceived a threat to public broadcasters' journalistic discretion from the program recording requirement in former Section 399(b) of the Communications Act, which it struck down on First Amendment and equal protection grounds. *Community-Serv. Broadcasting*, 593 F.2d at 1122-23.12/ In analyzing the necessity for all of public broadcasting to be free of interference from the federal government, despite the dangers inherent in the federal funding scheme, the D.C. Circuit said:

> [R]ecognition of the risks of program-by-program review is one that has been shared by both the courts and the [FCC]. The FCC has generally eschewed any such review . . . and where it must take place, . . . review has been accompanied by judicially imposed standards and safeguards designed to minimize intrusion on First Amendment values.

12/ *See also League of Women Voters*, 468 U.S. at 370 n.7.

Id. at 1115 (citations omitted). The Eighth Circuit, in overruling its earlier decision in *DeYoung*, is establishing a regime that seeks to regulate, through judicial supervision under forum doctrine, a major portion of public broadcasting's editorial decision-making. This fails to minimize the danger to state licensees' First Amendment rights and, in the process, invites these enormous risks.[13/]

A contrary rule flows directly from *Forbes II*. Its potential effect is most palpable for state-related public broadcast licensees within the Eighth Circuit, but may well affect licensees in circuits other than the D.C., Fifth, and Eleventh. In the meantime, the chill on state-related public broadcasters' editorial freedoms under the Communications Act and the First Amendment is all too real.

13/ The danger is illustrated by *Marcus v. Iowa Public Television,* No. 4-96-CV-80690 (S.D. Iowa, Oct. 9, 1996), *injunction pending appeal denied,* No. 96-3645 (8th Cir. Oct. 11, 1996). In that case, various candidates, relying on *Forbes II*, challenged the editorial judgment of Iowa Public Television, an agency of the State of Iowa ("IPTV"), not to invite them to a weekly news program where the Democratic and Republican candidates in each of Iowa's House and Senate races were invited to appear over several successive weeks. IPTV based its decision on newsworthiness. The District Court found that the program was a limited public forum, and that IPTV's editorial decisions were narrowly tailored to serve a compelling governmental interest. Although IPTV's editorial decisions were vindicated by a detailed special jury verdict and the ruling of the District Court, the burden on IPTV was enormous. No broadcaster can long afford to spend such resources to protect its right to make programming decisions, the lifeblood of its service to the public.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 19, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2722WA

Ralph P. Forbes, and The People,	*	
Appellant,	*	
v.	*	
The Arkansas Educational Television Commission, and its Board of Directors in their Official Capacities; The Arkansas Educational Telecommunications Network Foundation, and its Members and Officers Susan J. Howarth, in her Official Capacity as Executive Director; Victor Fleming, in his Official Capacity as Chairman; G. E. Campbell, in his Official Capacity as Vice-Chairman;	*	On Appeal from the United States District Court for the Western District of Arkansas.

Dr. Caroline Whitson, in her *
Official Capacity as Secretary; *
Diane Blair, in her Official *
Capacity as Commissioner; *
S. McAdams, in his Official *
Capacity as Commissioner; *
James Ross, in his Official *
Capacity as Commissioner; *
Jerry McIntosh, in his Official *
Capacity as Commissioner; *
Lillian Springer, in her *
Official Capacity as *
Commissioner; Amy L. Oliver, *
in her Official Capacity as *
Production Manager; Bill *
Clinton, his Official Capacity *
as Governor of the State of *
Arkansas; John Does, Sued as *
certain" John Doe" crooked, *
lying politicians and *
political "dirty tricks" *
operatives and special *
interests, etc.; KHBS *
TV/Channel 40 UHF; KHOG *
TV/Channel 29 UHF; American *
Broadcasting Company, Agent *
Darrel Cunningham; *
Steve Barnes, KARK TV, *
4 Eye-Witness News and AETN *
Producer; Oscar Eugene Goss, *
Arkansas Educational Television *
Network; Carol Adornetto; *
Larry Foley; Lavenia Craig, *
in her Official Capacity as *
Commissioner; Robert *

Doubleday, in his Official *
Capacity as Commissioner, *
*
Appellees. *

Submitted: April 11, 1996

Filed: August 21, 1996

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R. GIBSON, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

This case is before us for the second time. On the prior appeal, this Court, sitting *en banc*, held that the plaintiff, Ralph P. Forbes, had stated a claim. *Forbes v. Arkansas Educational Television Network*, 22 F.3d 1423 (8th Cir.) *(en banc)*, *cert. denied*, 115 S. Ct. 500 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes). The case arises out of a debate staged by the defendant Arkansas Educational Television Commission, an agency of the State of Arkansas, between the Democratic and Republican candidates for Congress in the Third District of Arkansas in 1992. Mr. Forbes, who was also a legally qualified candidate in that race, asked to be included in the debate but was refused. He claimed, among other things, that his exclusion violated the First Amendment, as made

applicable to the states through the Due Process Clause of the Fourteenth Amendment. We held that the First Amendment applied fully to the Arkansas Educational Television Network (AETN), and that the defendants were not free to exclude Mr. Forbes without a reason good enough to pass muster under that Amendment. The case had not progressed far enough for defendants to file an answer. Hence, there was no way of knowing, on the state of the record as it then existed, why AETN had excluded Mr. Forbes. The case was remanded for further proceedings.

On remand, the plaintiff's First Amendment claim was tried to a jury. By special verdicts, the jury found that the decision to exclude the plaintiff from the debate was not the result of political pressure, and that it was not based on opposition towards plaintiff's political opinions. In addition, the District Court instructed the jury that the congressional debate, as set up by the defendant network, was a non-public forum. Judgment was entered for defendants.

Mr. Forbes now appeals. He argues that the debate was a limited public forum, and that the reason given for excluding him, that he was not a "viable" candidate, even if it was the true reason, was not legally sufficient. We agree. We hold that a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on such a subjective ground. To uphold such a defense would, in our view, place too much faith in government.

I.

We briefly restate enough of the facts and proceedings below to place the present issue in context. In October 1992, the Arkansas Educational Television Commission

decided to conduct and broadcast a debate between the Republican and Democratic candidates for Congress in the Third District of Arkansas. The plaintiff, Ralph P. Forbes, then became a duly qualified independent candidate under state law. He was certified as an independent candidate because he had gathered enough signatures on petitions. Under state law, a candidate must file petitions signed by at least three percent of the qualified electors in the district in which he is seeking office, provided, however, that no more than 2,000 signatures are required. Ark. Code Ann. § 7-7-103(c)(1). Mr. Forbes heard about the debate and asked to be included. AETN refused, and the debate took place on October 22, 1992, without Mr. Forbes's participation. In the meantime, the plaintiff had filed suit in the District Court, seeking a preliminary injunction, but this relief was denied. Thereafter, the District Court granted AETN's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The plaintiff appealed, and this Court, sitting *en banc*, affirmed in part and reversed in part. We rejected Mr. Forbes's claim under the Federal Communications Act, holding that § 315 of that Act, 47 U.S.C. § 315, does not create a private cause of action. As to the First Amendment claim, however, we held that Forbes's pleading was sufficient to survive a motion under Rule 12(b)(6). The defendants argue that the case should be governed by public-forum analysis. In response to this position, we held that governmentally owned television stations are not traditional public fora, but that they might, under the particular circumstances of any given case, create a limited public forum, "a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, a limited topic,

or a limited class of speakers." *Forbes*, 22 F.3d at 1429 (citations omitted). We added:

> Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest.

Ibid. Observing that "AETN . . . has not yet articulated any principled reason for excluding Forbes," *id.* at 1430, we remanded for further proceedings.

On remand, as we have previously noted, the District Court tried the case to a jury. In accordance with our en banc opinion, the Court correctly refused to submit to the jury any claim under the Communications Act itself. Only the First Amendment claim was submitted. But before the case went to the jury, the District Court held, as a matter of law, that the debate in question was a non-public forum. The District Court said: ". . . the Court has ruled that the type of forum we are talking about in this case is a non-public forum." Thus, the question whether the debate was a non-public forum or a limited public forum was not submitted to the factfinder. It was taken from the jury and decided by the Court. The issue whether defendants'

proffered justification -- that Forbes was not a viable candidate -- would be legally sufficient if the debate were a limited public forum was not reached. Instead, the District Court submitted to the jury only those discrete issues of fact that it deemed relevant under its holding that the debate was a non-public forum.

On special verdicts, the jury found, first, that the decision to exclude Mr. Forbes was not the result of any political pressure coming from outside the professional staff of AETN. (Under the theory presented by defendants at the trial, this would have been the only basis for a recovery by the plaintiff.) The jury found, in addition, that the defendants did not exclude Mr. Forbes from the debate because of disagreement with his opinions. In accordance with these findings of fact and the Court's holding on the public-forum issue, judgment was then entered for defendants.

II.

We first discuss three procedural arguments made by Mr. Forbes as part of his attempt to upset the judgment of the District Court. The first argument has to do with the special interrogatories put to the jury. The first of these interrogatories read as follows:

> Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network?

Trial transcript (Tr.) 475. The jury answered no to this question. *Id.* at 502. Mr. Forbes's argument is that this interrogatory was unnecessary to a finding that AETN violated [illegible] First Amendment rights, and that submitting it to the jury was confusing. We do not agree that use of the interrogatory was reversible error.

Whether to submit a case on special interrogatories, and, if so, how to phrase them, are matters committed, within broad limits, to the discretion of the district courts. We have no reason to believe that this jury was confused. We have great faith in juries, and their desire and ability to follow instructions and make distinctions among the various issues put before them. It may be true that submission of this special interrogatory, strictly speaking, was unnecessary. The First Amendment can be violated even if no political pressure is exerted. For example, officials of AETN, entirely apart from political pressure, might have decided to exclude Mr. Forbes because of disagreement with his political opinions. (As we have seen, the jury found that this did not occur, but, at the time the case was submitted to the jury, this was still a live issue.) It is very likely that the exertion of political pressure, if it had occurred, would have been a good theory of First Amendment violation, because such pressure, in all probability, would have proceeded out of someone's disagreement with or prejudice against Mr. Forbes's political positions. The jury's negative answer to the interrogatory did not mean that the case was over; it meant only that one possible theory of liability had been rejected. The jury remained free to consider the other interrogatories submitted to it, and we believe it did so conscientiously.

The jury then went on to answer the second interrogatory, asking whether the decision to exclude Mr.

Forbes was based on disagreement with his political viewpoint. The answer to this question was no. We do not know what our answer would have been if we had been sitting on the jury, but that is not important. There was conflicting evidence on this issue, and it could have gone either way. Making decisions of this kind is exactly what juries are for. It was within the discretion of the District Court to submit the issue to the jury in this form, and the evidence is sufficient to support its negative answer.

Mr. Forbes also argues that it was prejudicial error to exclude evidence which, he contends, would have shown that the husband of the producer of the debate for AETN was prejudiced against him. We cannot agree that any error was committed in this regard. If we assume that the husband did not like Mr. Forbes's opinions, and if we further assume, and this would be something of a stretch on the present record, that his wife knew this, it by no means follows that the wife was in agreement. Spouses' political opinions sometimes agree. They sometimes disagree. We do not think any general inference can be drawn from the opinion of one spouse to that of the other. The District Court did not abuse its discretion in rejecting this evidence.[1/]

1/ Mr. Forbes also argues that the District Court erred in refusing to submit the issue of punitive damages to the jury. We believe the District Court acted correctly in this regard. There was no substantial evidence of malice or other outrageous conduct on the part of these defendants. Therefore, there would have been no basis for an award of punitive damages, and such an award, if returned by the jury, would have to be set aside for lack of sufficient evidence.

III.

It remains to discuss what has emerged as the main issue -- whether the congressional debate staged by AETN was a limited-purpose public forum, or a non-public forum, and, if it was the former, whether AETN's reason for excluding Mr. Forbes can survive scrutiny under the First Amendment. (We agree with the District Court that the jury's finding that the exclusion was not viewpoint-based is fatal to Mr. Forbes's case if the debate was a non-public forum.) That this is the major issue in the case became clear at oral argument. Counsel for defendants, citing *Bose Corp. v. Consumer's Union*, 466 U.S. 485 (1984), argued that the issue of how to characterize the forum was properly decided by the judge. Certain First Amendment issues, he asserted, are for the Court, not the jury, and are then subject to de novo review on appeal.

We are not sure that *Bose* holds that all First Amendment issues of fact are to be decided by the court instead of the jury in cases otherwise triable to a jury under the Seventh Amendment. This is an action at law for damages, a timely demand for jury trial was made, and a jury was properly empaneled. Certain issues of historical fact -- for example, whether Forbes was excluded from the debate because of hostility to his opinions -- are certainly for the jury, assuming that the evidence was in sufficient conflict to allow reasonable jurors to go either way. Thus, the issues covered by the special interrogatories put to the jury in this case were correctly treated as jury issues, and we do not understand defendants to argue otherwise.

By contrast, the question of what exactly the forum was in this case, whether it was a non-public forum or a limited public forum, is a different sort of issue. It is a mixed

question of law and fact, as to which the answer is obtained by applying legal principles to facts. We do not understand the historical facts -- for example, who set up the debate, who was invited to attend, who was excluded, and the like -- to be in dispute. If defendants, by citing *Bose*, are asserting that such issues are never to be submitted to juries, we are not convinced. *Bose* has to do with the reviewing or appellate function in First Amendment cases. It does not, at least not in so many words, address the division of functions between judge and jury at the trial level.

In the present case, this distinction, between the division of functions at the trial level and the standard of review at the appellate level, seems to us of no practical significance. Suppose the district court had allowed the issue of how to characterize the forum to go to the jury, and suppose the jury had decided it one way or the other. The party losing this issue would surely have filed a motion for judgment notwithstanding the verdict, now called a motion for judgment as a matter of law, and the district court would have ruled on the motion. In doing so, the district court would have gone through the same mental process engaged in by appellate courts. It would have been exercising essentially a reviewing function. And this Court, in turn, would have been bound to apply the *Bose* approach on appeal.

The Supreme Court's opinion in *Bose* holds that appellate courts must "conduct an independent review of the evidence on . . . dispositive constitutional issue[s]" in First Amendment cases. 466 U.S. at 508. *Bose* was a bench-tried case, but the opinion clearly indicates that the same appellate standard applies in cases tried to juries:

> . . . The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge.

Id. at 501. In short, "First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508-09 n.27. Our recent opinion in *Families Achieving Independence and Respect v. Nebraska Department of Social Services*, _____ F.3d _____, _____, 1996 WL 426147 *3 (8th Cir., July 31, 1996), reaches the same conclusion: "[W]here . . . constitutional issues [in First Amendment cases] present mixed questions of law and fact, our review is de novo."

We have a complete record before us on the public-forum question, and we have the holding of the District Court on that issue. We now proceed to exercise our constitutional duty to conduct an independent review.

As an initial matter, we must determine whether the forum at issue is the television station, AETN, or the Third District congressional debate. At oral argument and throughout its brief, AETN contends that the station is the relevant forum. Forbes, on the other hand, contends that our analysis should focus on the debate.

The choice between the two forums suggested is not a difficult one. "In defining the forum we [ ] focus [ ] on the access sought by the speaker." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). If the speaker seeks general access to public property, the forum encompasses that property. But if only limited access is sought, we must take a "more tailored approach to

ascertain[ ] the perimeters of a forum within the confines of the government property." *Ibid.*

Forbes sought access to the debate alone. The debate is a particular program among the numerous programs broadcast by AETN each day. Traditionally, when a speaker "seek[s] access to a particular means of communication," it is that particularized forum which becomes the focus of analysis. *Ibid.* In keeping with that tradition, we conclude that the debate – the means of communication to which Forbes seeks access – is the relevant forum in this case.

Having identified the forum, we now turn to the more difficult question of determining its character. Forbes maintains that by staging the debate, AETN created a limited public forum. This type of forum has been defined as a forum "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802. The Supreme Court has recognized the existence of a limited public forum in a number of instances where the State "does not itself speak or subsidize transmittal of a message it favors but instead . . . encourage[s] a diversity of views from private speakers." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2519 (1995). Examples of limited public forums include university meeting facilities opened for use by registered student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), and municipal theaters open to theater productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). See also *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (advertising space on public bus held to be a limited public forum for commercial advertising); *Healy v. James*, 408 U.S. 169 (1972) (public

college's recognition of student political groups created a limited public forum).

A non-public form, by contrast, is "[p]ublic property which is not by tradition or designation a forum for public communication . . .." *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). A non-public forum is not necessarily transformed into a public or limited public forum even though the State engages in a practice of "selective access," by "allow[ing] some organizations . . . to use the facilities." *Id.* at 47. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995) (forum is nonpublic when "reserved for specific official uses"). In *Perry*, the Supreme Court held that a public school's internal mail system was a non-public forum even though officials had allowed some community organizations to use the system. *Perry*, 460 U.S. at 47 (finding no evidence that "permission ha[d] been granted as a matter of course to all," the Court concluded that "selective access does not transform government property into a public forum."). Similarly, in *Cornelius*, the Supreme Court held that the Combined Federal Campaign (CFC), an annual charitable-fundraising drive administered by the Office of Personnel Management, was a non-public forum. As it did in *Perry*, the Court reasoned that "selective access [to charities], unsupported by evidence of a purposeful designation for public use, [did] not create a public forum." *Cornelius*, 473 U.S. at 805.

There is no bright line or objective test for determining the character of the forum. We can say without reservation, however, that the forum in this case, the debate, is a limited public forum. Just as the university in *Widmar* created a limited public forum by opening its facilities to registered student groups for expressive speech, AETN, by staging the

debate, opened its facilities to a particular group -- candidates running for the Third District Congressional seat. The debate may be readily distinguished from the forums at issue in *Cornelius* and *Perry*. In *Cornelius*, it was clear that the CFC was not created "for purposes of providing a forum for expressive activity." *Ibid.* The expression made by giving money to charity was merely incidental to the purpose for which the forum was opened -- "to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property." *Ibid.* Likewise, the forum in *Perry*, the school's internal mail system, was designed solely for expression relating to school business. Access to the system was granted to groups on an individual basis and was not "granted as a matter of course" to any particular group. The debate staged by AETN, on the other hand, was staged in order for the candidates to express their views on campaign issues.

The debate was surely a place opened by the government for a limited class of speakers. What was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? The latter answer, which essentially is the position espoused by defendants, is not supportable either as a matter of law or logic. Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation. It must be emphasized that we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment, and that exclusion of one such speaker has the effect of a prior restraint - it keeps his views from the public on the occasion in question.

The real issue, we think, is the legal sufficiency of the reason given for the exclusion. If AETN had considered Mr. Forbes a viable candidate, it would, by its own account, have included him in the debate. There is nothing about being a Democrat or a Republican, *a priori*, that is relevant here. Rather, AETN's point is that Mr. Forbes, in the opinion of the network, had no chance to win. It therefore decided that its viewers should not hear Mr. Forbes's opinions as part of the debate involving the other candidates qualified to appear on the ballot.

We do not think that AETN's opinion on such a debatable matter as the political viability of a candidate for Congress more than two months in advance of the election can be a sufficient basis for narrowing the channels of public discourse. AETN itself characterizes the criteria it used as follows: "While these criteria can to some extent be considered as objective, ultimately their use is essentially subjective." Brief for Appellees 30. In a sense, the State of Arkansas has already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican nominee and the Democratic nominee. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication.

We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government.

The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment. Compare *Families Achieving Independence and Respect v. Nebraska Department of Social Services, supra*, ___ F.3d at _____, 1966 WL 426147 *3-4 (vague standard cannot justify exclusion even from a non-public forum). If Mr. Forbes can be excluded today, a Republican or a Democrat who is believed to have no chance of success could be excluded tomorrow. It is worth noting that Mr. Forbes himself received the most votes in the preferential primary for the Republican nomination for Lieutenant Governor in 1990. (He was defeated in a run-off primary.) To give just one more example, in 1958, in the Second Congressional District, a write-in candidate who equipped his supporters with stickers that could readily be applied to the ballot defeated the incumbent Democratic Member of Congress, despite the fact that he began his campaign very shortly before the election. Political viability is a tricky concept. We should leave it to the voters at the polls, and to the professional judgment of nongovernmental journalists. A journalist employed by the government is still a government employee.

In short, we hold that the reason given for excluding Mr. Forbes (and we accept at face value defendants' proffered reason) was not legally sufficient under the First Amendment. It was neither compelling nor narrowly tailored. Mr. Forbes is entitled to a judgment in his favor so declaring. The only issue remaining to be decided is that of damages, whether nominal or compensatory.

The judgment of the District Court is reversed, and the cause remanded for further proceedings consistent with this

opinion. The District Court is instructed to enter judgment for the plaintiff Forbes and against the defendant Arkansas Educational Television Commission, and, thereafter, to empanel a jury for the sole purpose of determining the amount of actual damages sustained.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2722WAFS Ralph P. Forbes, etc.	*	
Appellant,	*	
	*	Appeal from the United
vs.	*	States District Court
	*	for the Western District
The Arkansas Educational	*	of Arkansas
Television Commission, etc.,	*	
et al.,	*	
	*	
Appellees.	*	

The motion for stay of mandate is denied. A couple of observations may be helpful. First, defendants are free, to the extent provided by law, to cover bona fide news events, including candidate debates organized by people or groups other than the defendants. Second, no question with respect to write-in candidates was presented or decided in this case.

It is so ordered.

September 26, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES PLAINTIFF

vs. Civil No. 92-2190

AETN ET AL DEFENDANTS

JUDGEMENT

This case came on for trial before the court and a jury, the Honorable H. Franklin Waters presiding, and the issues having been duly tried and the jury having rendered its verdict herein,

IT IS ORDERED AND ADJUDGED, in accordance with the jury verdict returned on June 7, 1995, that the plaintiff take nothing on his complaint filed herein and that this matter should be and it hereby is dismissed with prejudice.

Dated this 7th day of June, 1995.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

APPENDIX D

INTERROGATORY NUMBER ONE: Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressure from anyone inside or outside of the arkansas educational television network?

ANSWER: Yes (YES OR NO)

(DATE) (SIGNATURE OF FOREPERSON)

INTERROGATORY NUMBER TWO: Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views?

ANSWER: Yes (YES OR NO)

(DATE) (SIGNATURE OF FOREPERSON)

If you answered "yes" to interrogatory number two, please answer this interrogatory.

INTERROGATORY NUMBER THREE: State the amount of damages you find from a preponderance of the evidence were sustained or incurred by the plaintiff as a direct result of the conduct of the defendants.

ANSWER: _____ (AMOUNT)

_____ _____

(DATE) (SIGNATURE OF FOREPERSON)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 93-1031WA

Ralph P. Forbes, and the People,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	
Arkansas Educational Television	*	
Communication Network	*	
Foundation, and its Board of	*	
Directors in their official	*	
capacities; Arkansas Education	*	
Telecommunications, and its	*	
members and officers; Susan J.	*	
Howarth, in her official	*	
capacity as Executive Director;	*	
Victor Fleming, in his official	*	
capacity as Chairman;	*	On Appeal
G.E. Campbell, in his official	*	from the United
capacity as Vice-Chairman;	*	States District
Dr. Caroline Whitson, in her	*	Court for the
official capacity as Secretary;	*	Western District
Diane Blair, in her official	*	of Arkansas.
capacity as Commissioner;	*	
S. McAdams, in his official	*	
capacity as Commissioner;	*	
James Ross, in his official	*	
capacity as Commissioner;	*	

Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager; Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does; KHBS-TV/Channel 40 UHF; KHOG-TV/Channel 29 UHF; American Broadcasting Company; Darrel Cunningham, in his individual capacity,

Appellees.

Submitted: August 31, 1993

Filed: April 28, 1994

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The petitioner, Ralph Forbes, appeals the District Court's dismissal of his complaint for failure to state a claim

upon which relief can be granted. Forbes raises two issues. First, does a private television station violate the Federal Communications Act by deciding to air a political advertisement during "safe harbor" hours without first determining whether that ad is "indecent"? Second, does a political candidate who has qualified to be on the ballot have a right to be included in a debate sponsored by a public television station or, in the alternative, a right to equal access under 47 U.S.C. § 315[1/], when the other candidates are included? Relying on this Court's holding in *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), the District Court concluded that neither claim had merit, that the Communications Act cannot be enforced through a § 1983 action, and that Forbes had failed to state a claim under 42

1/ 47 U.S.C. § 315(a) provides that any person legally qualified as a candidate for public office shall be afforded the same opportunities as all other candidates for that office. However,

> No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary . . . or
> (4) on-the-spot coverage of bona fide news events . . .
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

47 U.S.C. § 315(a).

U.S.C. § 1981, § 1985, or the First and Fourteenth Amendments. We now affirm in part and reverse in part.

I.

In 1992, Ralph Forbes was an independent candidate for United States Representative for the Third Congressional District of Arkansas. He had obtained enough signatures to qualify for the ballot under state law. One of the defendants, the Arkansas Educational Television Network (AETN), is an instrumentality of the State of Arkansas. The other defendants are private television stations that broadcast in the Third Congressional District.

A few weeks before the general election on November 3, 1992, Forbes sued AETN and its agents (collectively the AETN defendants) alleging that AETN planned to sponsor a debate among the candidates for the Third Congressional District seat, but that it intended to include only the two major-party candidates. Forbes alleged that since he had qualified for the ballot as an independent candidate, he had a right to be included in the debate or, in the alternative, a right to additional air time on AETN to express his views, as required by the equal-time provision of 47 U.S.C. § 315. He claimed that AETN had denied him access to air time because of his political beliefs. Forbes also alleged that AETN's actions were taken in violation of 42 U.S.C. § 1981 *et seq.*, and that his First Amendment rights had been violated. Finally, Forbes alleged that his exclusion from the debates had deprived "the people" of their right to vote, and he sought declaratory and injunctive relief as well as compensatory and punitive damages.

Forbes alleged that he asked AETN to include him in the debate or give him additional time, and that his request

was refused. He then telephoned the Federal Communications Commission and claimed that an FCC representative told him to "go through the motions" of a proper complaint, although it would be a waste of time. Believing that pursuit of his claim through the FCC would be pointless, Forbes wrote the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. Instead, the FCC responded with a letter enclosing a statement of applicable law as well as instructions on how to file a complaint with the FCC. Forbes claims that he never received the enclosed materials, although he acknowledges receipt of the letter.

Forbes then sought injunctive relief in the District Court and moved for a preliminary injunction to mandate his inclusion in the debate. He alleged that AETN's reasons for excluding him from the debate were discriminatory and were specifically designed to keep the public from learning of Forbes's views on certain policy issues. In support of this position, Forbes claimed that an official of AETN stated that the network would run "St. Elsewhere" rather than a debate that included Forbes, and that another official of AETN stated that Forbes had not been included because he was not a "serious" candidate.

The District Court denied the request for injunctive relief on October 20, 1992. On October 21, 1992, sitting as a single circuit judge, the writer of this opinion denied Forbes's request for an injunction pending appeal. The next day, a panel of this Court declined to disturb that action. The basis for both rulings - that of the panel and that of the single judge - was that *DeYoung v. Patten*, *supra*, was controlling Circuit precedent and directly in point against Forbes.

On November 2, the day before the election, Forbes amended his complaint to include private television stations KHBS-TV and KHOG-TV, the American Broadcasting Company, and their agent, Darrel Cunningham (collectively "the private stations"), as defendants. In his amended complaint, Forbes alleged that the private stations had violated the provisions of the Communications Act by refusing to air one of his anti-abortion advertisements except during the "safe-harbor" hours of 11:00 p.m. to 6:00 a.m. without first making a determination that the ad was indecent. Forbes alleged a criminal conspiracy, "RICO treble damages," and violations of 42 U.S.C. § 1981 *et seq.*, and claimed the private stations' actions also were in violation of 47 U.S.C. § 315. He renewed his claims against AETN defendants.

The AETN defendants filed a Rule 12(b)(6) motion, arguing that Forbes had no First or Fourteenth Amendment right to appear in a televisions debate, that he had no personal claim or cause of action under 47 U.S.C. § 315 to appear on television, that he failed to state a claim under 42 U.S.C. § 1981, and that he failed to state a cause of action against the AETN defendants. The private stations also moved for dismissal under Rule 12(b)(6), arguing that the District Court had no subject-matter jurisdiction under the Communications Act, and that Forbes has failed to exhaust his administrative remedies. The District Court, after properly setting forth the standard for granting a Rule 12(b)(6) motion, concluded that the standard had been met by both sets of defendants. It concluded, following this Court's holding in *DeYoung v. Patten*, *supra*, that Forbes had no right of access to the public airways, that no implied right of action exists under the Communications Act, and that § 1983 cannot be used to enforce the rights granted by 47 U.S.C. § 315. Additionally, the Court concluded that the

complaint contained only vague allegations of conspiracy that failed to state a claim under 42 U.S.C. § 1985.

II.

In reviewing a dismissal for failure to state a claim, we take the allegations well pleaded in the complaint as true. Motions to dismiss should not be granted unless it is clear beyond doubt that there is no set of facts the plaintiff could prove that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Forbes has raised three claims in his complaint. First, as against both the AETN defendants and the private stations, Forbes has claimed violations of 47 U.S.C. § 315 and a conspiracy under 42 U.S.C. § 1985. Second, Forbes has additionally claimed against AETN a § 1983 violation for failing to provide him with equal time as required by § 315. Finally, Forbes has alleged that AETN violated the First and Fourteenth Amendments by failing to include him in the debate.

A. Statutory Claims

First, with respect to Forbes's statutory claim, we agree with the District Court and the private stations that Forbes's complaint cannot stand. There is no private cause of action to enforce 47 U.S.C. § 315, and Forbes's proper course of action is to bring his claim before the Federal Communications Commission. Forbes failed to exhaust his administrative remedies; therefore, his claim that the private stations improperly refused to run his anti-abortion advertisement outside of safe-harbor hours was not properly before the District Court. Additionally, Forbes's claim that AETN improperly refused to grant him equal time, as required by § 315, likewise should have been brought before the FCC first and then appealed, if necessary, to a court of

competent jurisdiction. See *DeYoung*, 898 F.2d at 633-35. (We adhere to this aspect of *DeYoung*.) Since Forbes has failed to exhaust his administrative remedies, the District Court was correct in declining to rule on his statutory claims.

We further agree with the District Court that there is insufficient substance to Forbes's conspiracy claim to entitle him to relief under 42 U.S.C. § 1985. We also affirm the District Court's ruling that the failure to allege racial discrimination bars his claim under § 1981. Finally, we agree with the District Court that § 1983 is not available to enforce Forbes's claims under § 315 of the Communications Act, since that provision itself contains the remedy for its violation - a petition to the FCC. Nonetheless, we disagree with the District Court with regard to Forbes's constitutional claims, and now hold that Forbes did allege a First Amendment violation well enough to survive a motion to dismiss. We now turn to this claim.

B. First Amendment Claim

The District Court dismissed Forbes's First Amendment claim on the authority of this Court's holding in *DeYoung*, 898 F.2d 632, that "[a] political candidate does not have a 'constitutional right of broadcast access to air his views.'" *Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980). The Court concluded that the only claim Forbes had to warrant his inclusion in the debate was under the equal-time provision of the Communications Act. Since there was no private right of action under the Communications Act, nor was § 1983 available to enforce its provisions, Forbes's only remedy was through the FCC. Letter from the District Court to All Counsel of Record at 4, citing *DeYoung*, 898 F.2d at 634.

Generally speaking, it is true that a candidate does not have the right to demand air time. See *Kennedy* for President Comm., *supra*.[2/] Under the circumstances of the present case, we hold that Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny. In *DeYoung*, this Court concluded that a public television station, such as AETN, was a state actor. *DeYoung*, 898 F.2d at 631-32. We adhere to this conclusion. AETN is not a private entity, it is a state-owned television network, therefore, actions taken by the station, as well as actions taken by its employees and representatives, are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.

2/ In *Kennedy*, the FCC had denied a candidate's request for an opportunity to respond to the President's statements in a press conference. Since the press conference was a bona fide news event, and, therefore, the equal-time provision of the Communications Act was not triggered, the candidate argued that he had a First Amendment right to respond. The Court concluded that since there was no absolute right of access to the airways, the provisions of § 315 excluding bona fide news events from its requirements was not in violation of the First Amendment. *Kennedy*, 636 F.2d at 432. As a general rule, we agree with this principle - there is no First Amendment right to appear on television upon demand. However, the stations involved in *Kennedy* were private stations. See *Id.* at 419-20. In the present case, the fact that AETN is a public station and did, Forbes alleges, sponsor its own debate alters the analysis significantly.

As a state actor, AETN is faced with constraints not shared by other television stations. When it comes to the First Amendment claim, we conclude that *DeYoung* was wrongly decided. *DeYoung* holds that no First Amendment right to appear in a televised debate exists, at least beyond that given by § 315, *DeYoung*, 898 F.2d at 633-35, and that the only remedy available to a candidate in Mr. Forbes's position is to seek remedial action through the FCC. This holding would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any,[3/] that the excluded candidates could obtain relief under the Communications Act. We believe the error of such a proposition is self-evident. The state may not, by statute or otherwise, take such a discriminatory action, absent a compelling state interest.

The AETN defendants suggest that the case should be governed by public-forum analysis. If it is, the same conclusion follows: a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air. The reason for such an exclusion must be ascertained and measured against First Amendment standards.

3/ Regardless of the sponsor, the FCC has allowed non-inclusive debates to be broadcast over public stations. See *In re Sagan*, 1 FCC Rcd 10 (1986). The deference we give administrative agencies on questions of statutory interpretation does not extend to constitutional issues. See *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 492 n.4 (Clark, J., dissenting), *cert. denied*, 112 S.Ct 71 (1991).

In its discussions of public versus nonpublic fora, the Supreme Court has divided government property into roughly three categories. The first is the traditional public forum, such as the town square, "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Education Assn. v. Perry Local Engineers' Assn.*, 460 U.S. 37, 45 (1983). Public television stations do not fit into this category - there is no unlimited right of access to the airwaves. The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), a limited topic, or a limited class of speakers. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, 460 U.S. at 45.

The third category of governmental property is the nonpublic forum, which consists of property not usually compatible with expressive activity. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Even in the context of the nonpublic forum certain minimum First Amendment requirements apply:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 806 (citations omitted). Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights.4/ See *Gay & Lesbian Students*

4/ AETN and the Public Broadcasting System amici cite other circuits which they say have concluded otherwise. Most significantly, they cite *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987); *Chandler v. Georgia Public Telecommunications Comm'n.*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991); and *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). These cases do not precisely address the case before us. *Chandler* involved a factual situation similar to that in the case at bar; (continued...)

Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) (while there is no First Amendment right to receipt of public school funds, a state school is not permitted to refuse funding because it disagrees with an organization's message). It should be noted that the Public Television Station amici acknowledge that AETN does not have the right to exclude Forbes simply because they disagree with his point of view. Certainly, were the answer otherwise, there would be nothing to prevent the party in power from excluding all opposing parties, or particular religions, or minorities from public-television-sponsored debates.

III.

AETN has not filed an answer to Forbes's complaint; therefore, it has not yet articulated any principled reason for excluding Forbes. See *Cornelius*, 473 U.S. at 811 ("existence of reasonable grounds for limiting access to a

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4/ (...continued)
however, the Georgia Public Telecommunications Commission had offered the candidates there thirty minutes of air time to respond to the debate from which they were excluded, something AETN allegedly refused to do for Forbes. Additionally, we respectfully disagree with the Eleventh Circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions. See *Chandler*, 917 F.2d at 490-94 (Clark, J., dissenting). *Muir* did not involve a debate at all, but rather an attempt by Alabama and Texas public television viewers to force their public television stations to air a particular show. *Muir* correctly assesses the right of the public to have access to air time, but does not address the situation facing us here. *Johnson* involved a broadcast debate sponsored by a third party, not by a public television station.

nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination"). AETN must provide a rational and viewpoint-neutral justification for its determination. On this record, AETN has not yet done so; therefore, Forbes has stated a claim upon which relief can be granted, especially if we credit Forbes's allegation, as we must in reviewing a Rule 12(b)(6) dismissal, that AETN planned to air "St. Elsewhere" rather than allow Forbes to debate.

So much of the judgement as dismissed Forbes's statutory claims is affirmed. So much of the judgement as dismissed his claim under the First and Fourteenth Amendment for failure to state a claim is reversed, and the cause is remanded for further proceedings consistent with this opinion. That portion of *DeYoung v. Patten* which holds that the First Amendment places no restraint, beyond that imposed by the Communications Act, on the right of state agencies to sponsor candidate debates and pick and choose which candidates may take part, is overruled.[5/]

It is so ordered.

McMILLIAN, Circuit Judge, joined by JOHN R. GIBSON, Senior Circuit Judge, FAGG, MAGILL, and HANSEN, Circuit Judges, concurring in part in dissenting in part.

Although I agree with most of the majority opinion, for the reasons discussed below, I would affirm the order of the

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5/ Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations.

district court dismissing Forbes's complaint. Accordingly, I concur in part and dissent in part.

It has been an instructive experience to reconsider these issues. As a preliminary matter, however, I would hold that the FCC has exclusive jurisdiction of this litigation, including both the statutory and the constitutional claims, with the judicial review in the court of appeals and then the Supreme Court. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); see also *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved [since 1927] . . .

. . . The judgment of the Legislative Branch cannot be ignored or undervalued simply because [Forbes has cast his] claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgement of the Congress and the [Federal Communications] Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U.S. at 102-03.

It may be true that the FCC is not as vigilant or as sensitive to first amendment interests as it should be. *See Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1056-57 (5th Cir. 1982) (banc) (Frank M. Johnson, Jr., J., dissenting), *cert. denied*, 460 U.S. 1023 (1983). It may also be true that technological changes since the Supreme Court decided *Red Lion Broadcasting Co. v. FCC* in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, "raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." *See Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (banc) (Richard S. Arnold, C.J., concurring in the judgment). However, absent such developments, I would require Forbes to raise both his statutory and constitutional claims in proceedings before the FCC and not as an original matter in the district court.

Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes's 42 U.S.C. § 1985 civil conspiracy claim because his allegations were too vague and his 42 U.S.C. § 1981 claim because he failed to allege discrimination on the basis of race. Slip op. at 7. I also agree the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for refusing to broadcast his political advertisements except during the safe-harbor hours. *Id.* at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints

involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. *DeYoung v. Patten*, 898 F.2d 628, 633-34 (8th Cir. 1990) (no implied private right of action). I also agree that Forbes cannot use 42 U.S.C. § 1983 to enforce these statutory claims. Slip op. at 7; *DeYoung v. Patten*, 898 F.2d at 634-35 (§ 1983 remedy foreclosed by comprehensive enforcement mechanism).

With respect to Forbes's first amendment claim, I also agree that there is state action for the purposes of § 1983 because AETN is an instrumentality of the state. It is a state-owned, non-commercial, public television station; its employees are state employees who are represented in this appeal by the state attorney general. Slip op. at 8; *DeYoung v. Patten*, 898 F.2d at 631-32. I do not agree, however, that Forbes, even though he was a legally qualified candidate, had a first amendment right to be included in the candidate debate or that the candidate debate was a public forum for first amendment purposes. In my view, the candidate debate was a nonpublic forum. Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs. Nor do I think the candidate debate was a limited or quasi-public forum; the format of this candidate debate was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates. For this reason, I would hold that the candidate debate was a nonpublic forum.

"Control over access to a nonpublic forum can be based on . . . speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense*

& Education Fund, 473 U.S. 788, 806 (1985) (citations omitted). Presumably, AETN decided to limit the number of candidates in order to maintain a traditional debate format, rather than to expand the format to a panel discussion. Because AETN has yet to file an answer, AETN's reasons for designing the format of the candidate debate as it did are not known. However, it would not have been unreasonable or viewpoint-specific for AETN to have limited the candidate debate to only the two major party candidates, thus excluding minor party candidates and independent candidates, or, for that matter, to the two candidates who had the most support or who appeared to have the most likely chance of winning, for example, on the basis of poll results. It may not have been good programming, or even good politics, given voters' interest in and the occasional historical success of minor party and independent (and even fringe) candidates, to limit the candidate debate to the two major party candidates. Nonetheless, I would hold that AETN had the editorial and programming discretion to structure the candidate debate along those lines and that excluding Forbes from the candidate debate for those reasons would be viewpoint neutral.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3374WA

Ralph P. Forbes,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the United
	*	States District Court
	*	for the Western District
Arkansas Educational	*	of Arkansas.
Television Communication	*	
Network Foundation, et al.,	*	
	*	
Appellees.	*	

Filed: October 22, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R.GIBSON, Circuit Judges.

PER CURIAM.

The panel has before it the request of appellant that we review the order entered yesterday by Chief Judge Arnold, sitting as a single circuit judge.

We have considered the relevant materials, including the order of the District Court. Both the District Court and Chief Judge Arnold considered themselves bound by *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). So do we. This case is dispositive and is precedent binding on this panel.

The motion for injunction pending appeal is denied. The panel declines to set aside the order entered by Chief Judge Arnold as a single circuit judge. The order of the District Court, denying preliminary injunctive relief, is summarily affirmed. We direct that our mandate be issued forthwith.

The appellant Forbes is of course at liberty to file a timely petition for rehearing with suggestion for rehearing en banc. It will not be practical, however, for such a petition to be ruled on today. Accordingly, the defendants are free to proceed with the televised debate tonight in accordance with their plans.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3274WA

Ralph P. Forbes,	*	
	*	
Appellant,	*	
	*	On Motion for Injunction
	*	Pending Appeal from the
v.	*	United States District Court
	*	for the Western District
	*	of Arkansas
Arkansas Educational	*	
Television Communication	*	
Network Foundation,	*	
et al.,	*	
	*	
Appellees.	*	

Filed: October 21, 1992

Before RICHARD S. ARNOLD, Chief Judge.

ORDER

This matter was heard in chambers by me as a single circuit judge, upon the application of the appellant for injunctive relief pending appeal. After a full argument and discussion of all of the issues, I denied the motion. The reasons are fully stated on the record, and a transcript of the proceedings, including the reasons for the decision, is available to either side by arrangement with the Court Reporter.

The most important point, in my view, is that the plaintiff-appellant has only a small chance of prevailing on the appeal, under the controlling precedents of this Court, especially *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). This case appears to be a conclusive precedent against most of the appellant's theories, and it of course binds me, as it bound the District Court.

I have instructed the Clerk to submit the matter of injunctive relief pending appeal to a panel of three judges, including me. The panel will endeavor to rule on the question before the television debate in question, which is scheduled for 7:00 p.m. on the evening of Thursday, October 22, 1992. I have explained to both sides that my ruling is provisional only, and that the panel can overturn it.

Motion denied.

/s/ Richard S. Arnold
Richard S. Arnold, Chief Judge
United States Court of Appeals
for the Eighth Circuit

APPENDIX H

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES

The Arkansas Code, Chapter 3, provides:

6-3-101. Creation.

There is created an agency to be known as the Arkansas Educational Television Commission, hereinafter called "the commission."

6-3-102. Members.

(a)(1) The commission shall consist of eight (8) members, who shall be residents and qualified electors of the State of Arkansas, with at least one (1) member being appointed from each of the congressional districts of the state.

(2) At least one (1) member shall be a person who is actively engaged in the field of education in the public school system of this state, and one (1) member shall be a person actively engaged in education in an institution of higher learning in this state.

(3) No member of the commission shall hold another office of profit or trust under the United States, the State of Arkansas, or any political subdivision thereof, or any office or employment paid in whole or in part by any funds derived from tax sources, except persons actively engaged in the field of education in the public schools or institutions of higher learning in this state.

(4) No member of the commission shall have any financial interest in any facilities such as the commission is authorized to deal with, including any interest in any commercial television or radio station.

(b)(1) Commissioners shall be appointed by the Governor with the advice and consent of the Senate for terms of eight (8) years.

(2) Commissioners shall be eligible for reappointment.

(3) If a vacancy occurs at a time when the Senate is in session, the Governor shall, with the advice and consent of the Senate, appoint another commissioner for the unexpired term.

(4) If a vacancy occurs when the Senate is not in session, the Governor shall appoint a commissioner who shall take office immediately, but his appointment shall be subject to confirmation by the Senate at the next session of the General Assembly.

(5) If the appointment of such commissioner is confirmed by the Senate, he shall serve the remainder of the unexpired term.

(c) Each member shall be entitled to receive fifty dollars ($50.00) for each day actually in attendance at commission meetings, plus reimbursement for actual, reasonable, and necessary expenses for meals, lodging, and related expenses in attending board meetings, or other official travel in behalf of the commission, and shall be entitled to mileage at the rate provided by law or regulation for travel by state employees for official travel.

6-3-103. Organization -- Rules and regulations.

(a) Promplty after their appointment, the commissioners shall meet to organize.

(b) At the meeting they shall choose from their number a chairman, a secretary, and such other officers as they deem necessary.

(c) Thereafter officers shall be elected annually.

(d) The commission shall adopt rules regulating the conduct of its meetings and the transaction of the business of the commission.

6-3-104. Agents and employees.

(a) The commission may appoint such agents and employees as it deems necessary or may delegate to one (1) or more of its members, officiers, agents, or employees such powers and duties as it deems proper and is authorized to do by legislation.

(b)(1) The commission is authorized to contract with other educational institutions in this state for the employment and use, on a contract basis, of the full-time or part-time services of employees of those educational institutions and may pay for their services in accordance with the provisions of such contracts.

(2) In the event the Arkansas Educational Television Commission shall determine that the use of full-time or part-time services of employees of such other educational institutions in this state shall make it necessary that payment therefor be from funds appropriated for the commission for

the payment of regular salaries of employees of the commission, upon certification of the amount to the Chief Fiscal Officer of the State the amount shall be transferred from the appropriation made for regular salaries of the commission for the fiscal year involved to the appropriation for maintenance and general operation of the commission for such fiscal year and may be expended for payments under contracts as authorized herein.

6-3-105. Purpose -- Powers and duties generally.

(a) The commission is organized for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas.

(b) To this end, it is empowered and directed to survey, study, and appraise the need for an overall plan for the use of television facilities available for noncommercial educational use in the state.

(c) The commission is specifically charged with the duty of controlling and supervising the use of channels reserved by the Federal Communications Commission to Arkansas for noncommercial educational use.

(d) It may designate the location of stations to utilize such channels and make rules and regulations governing the operation of these stations and the programs televised over these channels. The commission may own and operate television stations to utilize these channels, or it may contract with individuals, corporations, educational institutions, or other governmental agencies for the operation of such stations.

6-3-106. Execution of contracts.

The commission is authorized to execute all contracts and other instruments necessary an convenient to carry out the mandates of this chapter.

6-3-107. Acceptance of gifts or grants.

(a) The commision may solicit and accept gifts or grants of money, real or personal property, and voluntary and uncompensated services from any person, federal or other governmental agency, board of education, educational institution, or commercial or industrial enterprise.

(b) Any gifts and grants of money and any moneys derived from the sale of real or personal property donated to the commison may be placed in a bank in this state and may be disbursed by the commission for the purposes for which the gifts, grants, or real or personal property was donated or granted.

6-3-108. Equipment -- Limits on commission responsibility.

After receipt of any equipment furnished or installed by the Educational Television Commission, the commission will not be responsible:

(1) For additional reception problems which may occur; or

(2) For replacement of any of the furnished equipment.

6-3-109. Revolving cash fund.

(a) The commission is authorized to establish in a bank authorized to do business in this state, selected by the commission, a revolving cash fund into which the commission shal pay all funds received from the sale of instructional materials prepared by the commission or purchased by the commisson and sold to schools in this state in connection with educational television programs.

(b) In addition, the commission is authorized to expend from the revolving cash fund amounts necessary to purchase instructional materials for sale to schools to be used for educational television purposes, including the cost of freight, postage, handling, and other delivery costs incidental to the purchase or sale.

(c) The commission shall keep a complete record of all receipts and expeditures from the revolving cash fund and shall make the record available to the legislative auditors for audit and verification.

6-3-110. Appropriation and annual auit – State employees.

(a) No appropriation made availabe to the Arkansas Educational Television Commission or the Division of Educational Television of the State Department of Education shall be available until such time as the Chairman of the Arkansas Educational Television Commission certifies, in writing, to the Legislative Joint Auditing Committee that an audit is being conducted of the Arkansas Educational Telecommunications Network Foundation for the previous fiscal year and has promptly been made available to that committee.

(b) At the end of each fiscal year, the chairman of the commission shall initiate an audit of the Arkansas Educational Telecommunications Network Foundation by a recognized and certified public accounting firm acceptable to the Legislative Auditor with such audit standards and schedules that may be promulgated by the Legislative Auditor, such audit to be paid for by the Arkansas Educational Telecommunications Network Foundation.

(c) No person employed by the Arkansas Educational Television Commission and paid from state funds shall receive supplemental compensation or remuneration from funds not appropriated by the state.

(d) State employees of the Division of Arkansas Educational Television, in fulfilling their day-to-day responsibilities, are to be supervised only by appropriate state employees, and, to that end, no person or employee paid from funds not appropriated herein shall supervise any state employee as herein provided.

6-3-111. Budget requests.

The Director of the Educational Television Divison of the Department of Educational shall submit budget requests of the Educational Television Division of the State Board of Education and the Director of the Department of Education, General Education Division, for their review and approval, before the budget submissions are forwarded to the Governor and the Arkansas Legislative Counsel.

6-3-112. Authorization for lease of facilities.

(a) The Arkansas Educational Television Commission is authorized and empowered to arrange for the

use of its facilities, including, without limitation, tower space, studios, and equipment, by any federal, state, or local governmental agency or by any other person, from time to time, as any of such facilities are not needed by the commission, and to collect fees and charges, as the commission determines to be reasonable, in connection with the use of any such facilities by any other person; provided, however, agencies and educational institutions of the State of Arkansas shall have preference for the use of commission facilities over other entites and persons and shall be asesed fees and charges at preferential rates as determined by the commission.

(b) The commision shall be exempt from complying with general provisions of other laws dealing with public commodities and facilities and their acquisition, leasing, or disposition in relation to the use of its studios by other persons in such cases, as advertising for bids would be impractical because of time limitations.

(c) Any revenue received by the comission from the use of its facilities by other persons shall be cash funds pursuant to § 6-3-109.

(d) The commission is authorized to promulgate such regulations as it deems necessary for the implementation of this section.

6-3-113. Eminent domain power.

(a)(1) The Arkansas Educational Television Commission is hereby granted the right of eminent domain to condemn real property leased or rented by the commission if the property is deemed to be necessary or desirable by the commission for making the benefits of educational television

available to the citizens of Arkansas or to otherwise carry out the purposes of § 6-3-101 et seq., and if the commission is unable to agree with the owner of the land, or if, by legal incapacity or absence of the owner, no agreement can be made for the purchase.

(2) All suits for condemnation of real property under the provisions of this section shall be brought by the Arkansas Educational Television Commission in the name of the State of Arkansas.

(3) The real property may be acquired in fee simple or in any lesser estate.

(b) The commission is authorized to make payment for real property acquired under the provisions of this section out of any appropriation made for the Arkansas Educational Television Commission. No land shall be taken or contracted to be taken of an amount beyond the sum available therefor.

(c) The commission shall exercise the power of eminent domain in the manner provided for in § 27-67-311 et seq.

(d) Actions by the commission to condemn real property shall be brought in the county in which the land is situated. If the land is located in more than one (1) county, the action may be brought in any county in which the land is situated.

The Arkansas Code, Chapter 16, provides:

25-16-804. Removal and replacement.

(a)(1) As used in this section, unless the context otherwise requires, "good cause" includes:

(A) Conduct constituting a criminal offense involving moral turpitude;

(B) Gross dereliction of duty; or

(C) Gross abuse of authority.

(2) "Good cause" does not include any vote, decision, opinion, or other regularly performed or otherwise reasonably exercised power of a board or commission member.

(b)(1) The Governor may remove, for good cause, a state board or commission member whose office or position is filled by gubernatorial appointment, subject to confirmation by the Senate. If the Senate is not in session, confirmation shall be by written petition of a majority of the Senators.

(2) The Governor may appoint a qualified individual to replace the board or commision member removed to serve the remainder of his term, subject to confirmation by the Senate under circumstances where confirmation is normally required.

(c) All orders of removal by the Governor shall be in writing shall be delivered to the member removed or counsel for the member, and shall specifically set out the grounds relied upon for removal.

(d)(1) A removed board or commission member may institute proceedings for review by filing a petition in the Circuit court of Pulaski County within thirty (30) days after delivery to him or his attorney of the Governor's order of removal.

(2) This petition shall not supersede or stay the order of removal, nor shall any court enter an order to this effect or one which would impair the authority of the Governor to appoint a replacement whose service begins immediately upon fulfillment of the normal requirements for assuming office.

(e)(1) When the matter is heard by the Circuit Court of Pulaski County, it shall be tried *de novo* without a jury.

(2) The Governor shall have the burden of proof to show by clear and convincing evidence that good cause existed for removal of the board or commission member in question from office and for revoking his commission.

(3) If the court determines that good cause has been shown, it shall enter an order removing the board or commision member in question from office and revoking his commission. If the Court determines that good cause has not been shown by clear and convincing evidence, the court shall order the removed member reinstated to his position and, upon request, shall aware a reasonable attorney's fee and court costs to the reinstated party.

(f)(1) Subject to the restrictions of subsection (d) of this section on supersedeas or stay orders, a removed board or commision member may appeal the decision of the circuit court to the Arkansas Supreme Court.

(2) The Governor may appeal the decision of the circuit court to the Arkansas Supreme Court, but the appeal shall not preclude the circuit court, in its discretion, from entering an order reinstating the removed member.

(g) No board or commission action in which the appointed replacement participates shall be void, voidable, or in any way subject to invalidation on grounds of participation of the appointment replacement or lack of participation by the removed member in the event that the circuit court or the Arkansas Supreme Court orders the removed member reinstated.

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishmet of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

47 U.S.C. § 153 provides:

For the purposes of this chapter, unless the context otherwise requires --

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or

foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, he deemed a common carrier.

47 U.S.C. § 309 provides:

(a) Consideration in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which seciton 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 312 provides:

Administrative Sanctions (a) The commission may revoke any station license or construction permit --

. . . (7) for willful or repeated failure to allow reasonable access to or to permit pruchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 315 provides:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a

broadcasting station, he shall afford equal opportunites to all other such candidates for that office in the use of such broadcastng station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

47 U.S.C. § 402 provides:

(a) *Procedure.* Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

47 C.F.R. § 73.1941 provides:

(a) *General requirements.* Except as otherwise indicated in § 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunites to all other candidates for that office to use such facilities. Such licensee shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:

(1) Bona fide newscast;

(2) Bona fide news interview;

(3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(4) On-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of broadcasting station. (section 315(a) of the Communications Act.)

(b) *Uses.* As used in this section and § 73.1942, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under § 73.1941(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) *Timing of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) *Burden of proof.* A candidate requesting equal opportunities of the licensee or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or

make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for hte same public office.

47 C.F.R. § 73.1944 provides:

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) *Weekend Access.* For purposes of providing reasonable access, a licensee shall make its facilities available for use by federal candidates on the weekend before the election if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. Licensees shall not discriminate between candidates with regard to weekend access.

APPENDIX I

Statement of Principles of Editorial Integrity in Public Broadcasting

Developed by
The Editorial Integrity Project

Jolly Ann Davidson, Chair
O. Leonard Press, Vice-chair

Printed with funds provided by
The Corporation for Public Broadcasting

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Statement of Principles of Editorial Integrity in Public Broadcasting

The mission of public broadcasting is to bring to Americans the highest accomplishments of our society and civilization in all of its rich diversity, to permit American talent to fulfill the potential of the electronic media to educate and inform, and to provide opportunities for diverse groups of the American people to benefit from programming unavailable from other sources.*/

The basis of public broadcasting's mission lies in the Communications Act of 1934 as amended in 1967. Congress determined that Americans' general welfare would be furthered by encouraging public telecommunications services responsive to the people's interests. Congress also found that supporting public telecommunications was an important concern of the federal government, and that developing public broadcasting programming depended on freedom, imagination and initiative on both local and national levels.**/

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*/ *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting*. Bantam: New York, 1979.

**/ Communications Act of 1934, as amended, Sec. 396: (a) The Congress hereby finds and declares that --

(1) It is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(2) It is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications

(continued...)

No one is more important to the fulfillment of public broadcasting's mission than the men and women serving on the boards of trustees of local licensee stations. So that the trustees can make the best decisions on issues affecting the licensee, they must encourage both comments and criticism from citizens' groups and public representatives. Trustees need to assure they are responsive to the needs of the public in a responsible manner. Each board should have a public

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**/ (...continued)
services;

(3) Expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(4) The encouragement and support of public telecommunications, while matters of importance for private and local development, are also of appropriate and important concern to the Federal Government;

(5) It furthers the general welfare to encourage public telecommunications services which will be responsive to the interest of people both in particular localities and throughout the United States, which will constitute and expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation;

(6) It is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States; and

(7) A private corporation (the Corporation for Public Broadcasting) should be created to facilitate the development of public telecommunications and to afford maximum protection from extraneous interference and control.

policy stating the principles by which it intends to conduct the business of the licensee, including the solicitation of public comment. That policy should recognize the taxpayers' right to criticize the public broadcasting agency.

Trustees are also responsible for guarding public broadcasting's editorial integrity and its reputation. Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens. Programming based on the principles of editorial integrity will guarantee journalistic objectivity, as well as a fair and balanced presentation of issues.

In order to assure that programs meets the standards of editorial integrity the public has a right to expect, the following five principles and guidelines establish a foundation for trustee action. The principles and guidelines also form a basic standard by which the services of a public broadcasting licensee can be judged. At the same time, they form a basis for evaluating all aspects of public broadcasting station's governance, form enabling legislation to the policy positions of the licensee board. The ultimate goal of the principles and guidelines is to assist public broadcasting trustees in fulfilling their vital role in this important public service.

I. We Are Trustees of a Public Service.

Public broadcasting was created to provide a wide range of programming services of the highest professionalism and quality which can educate, enlighten and entertain the American public, its audience and source of support. It is a noncommercial enterprise, reflecting the worthy purpose of the federal and state governments to provide education and cultural enrichment to their citizens.

As trustees of this public service, part of our job is to educate all citizens and public policy makers to our functions, and to assure that we can certify to all citizens that station management responsibly exercises the editorial freedom necessary to achieve public broadcasting's mission effectively.

II. Our Service Is Programming.

The purpose of public broadcasting is to offer its audiences public and educational programming which provides alternatives in quality, type and scheduling. All activities of a public broadcasting licensee exist solely to enhance and support excellent programs. No matter how well other activities are performed, public broadcasting will be judged by its programming service and the value of that service to its audiences.

As trustees, we must create the climate, the policies and the sense of direction which assure that the mission of providing high quality programming remains paramount.

III. Credibility Is the Currency of our Programming.

As surely as programming is our purpose, and the product by which our audiences judge our value, that judgment will depend upon their confidence that our programming is free from undue or improper influence. Our role as trustees includes educating both citizens and public policy makers to the importance of this fact and to assuring that our stations meet this challenge in a responsible and efficient way.

As trustees, we must adopt policies and procedures which enable professional management to operate in a way which will give the public full confidence in the editorial integrity of our programming.

IV. Many of our Responsibilities Are Grounded in Constitutional or Statutory Law.

Public broadcasting stations are subject to a variety of statutory and regulatory requirements and restrictions. These include the federal statute under which licensees must operate, as well as other applicable federal and state laws. Public broadcasting is also cloaked with the mantle First Amendment protection of a free press and freedom of speech.

As trustees we must be sure that these responsibilities are met. To do so requires us to understand the legal and constitutional framework within which our stations operate, and to inform and educate those whose position or influence may affect the operation of our licensee.

V. We Have a Fiduciary Responsibility for Public Funds.

Public broadcasting depends upon funds provided by individual and corporate contributions; and by local, state and federal taxes. Trustees must therefore develop and implement policies which can assure the public and their chosen public officials alike that this money is well spent.

As trustees, we must assure conformance to sound fiscal and management practices. We must also assure that the legal requirements placed on us by funding sources are met. At the same time, we must resist the inappropriate use of otherwise legitimate oversight procedures to distort the programming process which such funding supports.

We the undersigned subscribe to this Statement of Principles

Robert L. Allen*
Executive Director
Oklahoma Educational
Television Authority

Jolly Ann Davidson‡
Chair
Iowa Public Broadcasting
Board

Gerald L. Appy
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Dave L. Fornshell
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The Editorial Integrity Project

Guidelines to the Principles of Editorial Integrity in Public Broadcasting

Amid the pressures of great events, general principle gives no help.

--Hegel

No statement of principles can do more than give general guidance to the trustees charged with overseeing a public broadcasting service. It is only through practical experience, a thorough knowledge of the policies and purposes which guide the institution, and a commitment to preserving its values that those facing difficult choices can make judgments which best serve the institution.

I. We Are Trustees of a Public Service.

Board members have an absolute responsibility to serve as the public's trustees of a service providing educational, cultural and informational programs; and to protect the credibility of that public trust. Because of public broadcasting's broad and serious responsibilities, the structure and autonomy of its licensee boards is vitally important. The board can carry out these responsibilities effectively only if it is structured or convened solely to govern the public broadcasting enterprise.

The trustees are also responsible for protecting editorial integrity against undue influence from any source. Undue influence is any direct or indirect influence that seeks to leave the person with the assigned responsibility for programming decisions no alternative but to comply.

In order to serve the public by protecting editorial integrity, the trustees need to understand their vital role in this important enterprise. Dallin Oaks, chair of the PBS Board, defined it very clearly:

> First, boards must educate the public, public officials and policymakers in their chain of command so that they understand the need for educational freedom. Second, we need to assure and certify to public officials and to the public that editorial freedom is being exercised responsibly.*/

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*/ *Proceedings of the Wingspread Conference on Editorial Integrity in Public Broadcasting.* Southern Educational Communications Association; Columbia, S.C., 1985.

To do this, trustees must be sufficiently involved with their institutions to set policies responsive to the public need, yet sufficiently detached from operations to evaluate the service objectively.

Trustees are responsible for assuring that their enterprise provides services at a high level of quality and responsiveness to the public. To be responsive to the citizens they serve, the trustees must assure that there is a protocol to consider diverse views and opinions from the public. The station's chief executive officer is responsible for creating and maintaining open and effective communication channels with the public.

II. Our Service Is Programming.

The purpose of public broadcasting is to provide its audiences with programming of a quality, variety and type not readily available elsewhere. All other activities of a public broadcasting licensee should be defined by and secondary to that purpose, for the ultimate measure of its effectiveness is the success of its programming.

Audiences of all ages identify public broadcasting by the programs they use. To them, public broadcasting is not an institutional structure. It is the excellent national and local programs which provide them with educational, informational and cultural opportunities. Policies, procedures, goals, objectives and activities within a station should be defined by their contribution to the programming mission.

To ensure the best environment for good program decision-making, and to ensure fundamental security for editorial integrity, the station's chief executive officer should report directly to the licensee board, and should be responsible for developing and implementing objectives based upon service goals developed by the trustees.

III. Credibility Is the Currency of our Programming.

Programming is the purpose of public broadcasting and the product by which audiences judge its value. Audiences hold public broadcasting programs to a high standard of excellence and judge their public broadcasting operations by rigorous credibility criteria. Public broadcasters therefore must operate above suspicion of vulnerability to undue influence. Trustees are ultimately responsible for assuring the reality and the perception of credibility.

The process of developing programs to meet the audience's needs must function under clear policies adopted and regularly reviewed by the trustees. This process must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

To best assure that the trustees have the necessary authority to implement their responsibility in this area, the trustees should have the authority to hire, fire, and set compensation for the station's chief executive officer, within fiscal realities of the times and the market. The chief executive officer, in turn, should have authority to set qualifications for staff; to hire, fire, assign, and set compensation for staff; all within guidelines established by the trustees. The chief executive officer should also have the established authority to act in the absence of stated policies.

IV. Many of our Responsibilities Are Grounded in Constitutional or Statutory Law.

All broadcast licensees, public and commercial operate under strict legal guidelines and restrictions. The license under which all stations operate is granted by the Federal Communications Commission according to federal statutory terms of the Communications Act of 1934 and subsequent amendments.

Certain provisions of the Communications Act, the Facilities Act of 1962, and the Public Broadcasting Act of 1967 as amended, apply specifically to public broadcasting. These provisions affect public broadcasting licensees' operations by restricting the use of federally funded facilities for revenue-generating purposes, bans on advertising, and bans on endorsement or support of candidates for political office.

Public broadcasting licensees are scrutinized rigorously as recipients of direct and indirect governmental aid. Many licensees exist on the basis of various state and local statutes containing a variety of operational responsibilities and regulations. In addition, public broadcasters often operate charitable foundations, endowments or corporations for fund-raising, program production, etc. which are subject to state and federal regulation as tax exempt entities.

Public broadcasting licensees also have the responsibility of operating within the areas of free press and free speech protected by the First Amendment. As such they are held to the same public scrutiny and expectations as the largest and most prestigious journals and networks in the country.

However burdensome or intimidating the complex labyrinth of statutory and regulatory responsibilities of public broadcasting licensees may be, they are far outweighed by the unlimited opportunities for service to the public. Trustees and station managers must master the intricacies of their legal circumstances and be prepared to seek remedy or exemption to any local or state regulation(s) which impair their ability to assure fidelity to the public trust which their broadcasting license represents. In no arena is the responsibility of the trustee to educate public policymakers more important.

V. We Have a Fiduciary Responsibility for Public Funds.

Public broadcasting operations use millions of dollars of individual and corporate contributions; and federal, state, and local taxes. Neither good structural design nor strict operational procedures will preserve the overall credibility of the system unless the public and its representatives perceive that they are getting good value for their money.

Trustee are responsible for assuring continued public support for and funding of the public broadcasting station, and should have total control over all funds and resources regardless of source, whether appropriated, earned or given. Yet state laws, regulations and operating practices often prevent this. While such management controls are necessary for usual state government operations, they can seriously hamper public broadcasting's ability to function efficiently and economically because its process and its product are so different from most state services and because it operates within deadline pressures unknown in most areas of government. It is often impossible to provide the high quality broadcasting service the public expects with many of the restrictions imposed by state operating systems.

While trustees of institutional licensees may not have ultimate control over the allocation of funds, they are nevertheless responsible for insuring that such funds are used effectively and efficiently. They must certify to the public and to all funders that they have spent public broadcasting funds wisely and well.

It is therefore necessary that trustees and station managers seek exemption from procedures and policies which may prevent the cost-effective and efficient operation of their licensee. Sound financial management of a public broadcasting station is crucial to it credibility.

Why the Principles of Editorial Integrity in Public Broadcasting Were Developed

". . . the goal we seek is an instrument for the free communication of ideas in a free society."[1/]

"An effective national educational television system must consist in its very essence of vigorous and independent local stations."[2/]

". . . as state instrumentalities, these public licensees are without the protection of the First Amendment."[3/]

The Wingspread Conference on Editorial Integrity in Public Broadcasting was convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in the light of past legal decisions and legislative actions. The managers and trustees also drafted policies and practices which would help to guarantee public broadcasting's editorial integrity in the future.

Editorial integrity is rooted in the traditional American values of freedom of speech and of the press. Tenaciously and courageously fought for by Revolutionary editors and

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1/ James R. Killian, Jr. *et al. Public Television, A Program for Action. The Report of the Carnegie Commission on Educational Television.* New York: 1967.

2/ *Ibid.*

3/ *Muir v. Alabama Educational Television Commission,* 688 F.2d at 1041.

pamphleteers, these values are codified in the First Amendment to the Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press.. ." The First Amendment is the "indispensable bulwark of democracy."[4/]

Broadcasting, the twentieth century electronic press, is the most powerful medium we have for disseminating information. Its power lies in its pervasiveness and in its ability to appeal directly through sight and sound to the intellect, and especially to the emotions, of its audience. This enormous power is in the hands of the Federal Communications Commission which has the final authority to grant or deny access to the technical means of broadcasting.

The social worth of any broadcasting system is determined by the honesty and integrity of the powerful few who can grant or deny this access. The writers, producers, and editors who create the programs, which are broadcasting's core, are subject to the governing structure of the institution which controls the technical means of broadcasting.

In the United States, the most influential gatekeepers are private financial interests licensed by the Federal Communications Commission. The history of broadcasting in this country is largely the story of the growth of a major commercial enterprise.

4/ Harry S. Ashmore. *Fear in the Air – Broadcasting and the First Amendment: the Anatomy of a Constitutional Crisis*. New York: 1973.

Several alternatives were available in the 1920s when it became apparent that some policies were necessary to deal with the burgeoning broadcasting structure. One was never considered – an unregulated market activity like publishing. The European model of a government monopoly was not seriously considered because of the American traditions of free enterprise and the weakness of socialist ideology in this country. Regulation as a common carrier was rejected because of the spectre of an American monopoly like AT&T.

When Congress passed the Radio Act of 1927, it rejected the government monopoly model for broadcasting adopted by many other Western nations. Instead, broadcasting became a regulated commercial activity, with private interests licensed by a federal agency as public trustees of specified frequencies, and charged to operate them in the "public interest, convenience, and necessity."

The system that emerged in 1927, and that remains today, is an uneasy compromise between government control and freedom of the press: broadcasters are selected by government and licenses; the licensing authority is ordered not to censor. It is a compromise that is possible only in a pluralistic society with a balance among a free print press, strong traditions of private enterprise, and individual freedom. But in choosing a system of licensed, limited channels, supported by advertising, the United States restricted its broadcasting largely to programming designed to attract the greatest number of viewers or listeners.

By 1934 the limited ability of the commercial broadcasting structure to provide educational, cultural and informational programming was becoming apparent. An amendment was proposed to the Communications Act of that year, reserving 25 percent of all radio frequencies for

educational, non-profit use. The amendment was defeated, but in 1945 the Federal Communications Commission set aside 20 of 100 FM channels for noncommercial radio, and in 1952 reserved 242 television channels for the noncommercial sector.

Educational institutions and state and local governments voluntarily sought these first noncommercial broadcasting licenses to enhance their ability to educate their constituencies, a legitimate activity for them. But it was an irony that in a nation where government broadcasting had not only been rejected but was anathema, government was now holding broadcast licenses. And it was to be a source of problems.

Several structures were selected to administer these noncommercial licenses, including state departments of education, local schoolboards, state university boards, and state agencies created specifically for broadcasting. In the latter case, state statutes were passed to establish and to provide a legal framework for the activities of the licensee.

As television's audiences increased, nonprofit community groups began to acquire noncommercial licenses, and began to broadcast more general interest programs.

By 1967, when Congress discussed how government could support alternative uses of broadcasting without violating the First Amendment, it was discussing a system already in place: 126 educational television stations and 268 noncommercial FM radio stations were operating, most licensed to educational institutions and state and local governments. Educational broadcasting was poised to become a national institution.

The 1967 congressional debate was guided by the report of the Carnegie Commission on Educational Television,[5/] established to "conduct a broadly conceived study of noncommercial television" and to *"focus its attention principally, although not exclusively, on community-owned channels and their services to the general public."*

The Carnegie Commission admitted that its attitude toward instructional television, the purpose of most of the existing stations, was ambivalent. It concluded that "with minor exceptions, the total disappearance of instructional television would leave the educational system fundamentally unchanged."

The Commission proposed a new kind of television – public television which was to include "all that is of human interest and importance which is not at the moment appropriate or available for support by advertising, and which is not arranged for formal instruction." And it proposed a new system

> "not patterned after the commercial system or the British system or the Japanese system or any other existing system. We have attempted to design something that corresponds to American traditions and American goals, that can coexist amicably with commercial television, and that together with commercial television can meet the highest needs of our society."

5/ Killian et al, *op. cit.*

To produce and distribute this new television, the Commission recommended a connected system of local stations and national production centers, funded by private and government funds distributed by a "federally chartered, nonprofit, nongovernmental corporation." The question was how to expand and improve the services of educational broadcasting, while the major concern was how to increase funding, especially the government funding deemed necessary, without opening the door to funder control.

Guided by the Commission report and prompted by President Lydon B. Johnson, Congress passed the Public Broadcasting Act of 1967. While Congress did not accept all the Commission's recommendations, it did follow the basic intent of the report by creating the Corporation for Public Broadcasting, a private, nonprofit organization to receive and spend private and federal funds for public broadcasting, and to provide an impartial, responsible buffer from political pressure.

As it had in 1927, Congress made an uneasy compromise. It failed to provide the stable funding that would insure effective planning and insulation from political interference. And the ability of the Corporation to carry out its mandate would depend on the ability of presidential board appointees to function nonpolitically. With some minor changes, it is a theoretical answer to a fundamental question that has worked well, and that has survived several serious challenges.

The major problems in the Commission's report and the resulting legislation was its failure to deal with the diversity of licensee structures in the educational broadcasting system. The expansion of services and programs to broader audiences cast stations in a role they

were ill-equipped to play well. Funding sources outside state government required accounting procedures of state licensees which they had no way to implement. State and local government and institutional licensees had the most difficulties.

These problems were noted in a 1980 study,[6/] which focuses on financial problems including budgeting, purchasing and reporting procedures. Personnel management, including classification and compensation, were difficult areas for many licensees. Many licensees, especially institutional ones, were concerned about governance and reporting structures.

To deal with some of these problems, many states have amended the statutes that enable them to hold broadcast licenses and to operate stations. Kentucky has given its broadcasting authority full jurisdiction over its personnel. Oklahoma has made it a misdemeanor punishable by a $1,000 fine or one year imprisonment for any elected official or his or her representative to influence or direct, or attempt to influence or direct, the content of any program shown on public television. A number of states have established nongovernmental foundations to receive and disburse funds.

Concluding its section on insulation from political interference, the 1980 study by Schenkkan said,

> "The First Amendment is, of course, one firm standard or criterion of protection, in spite of the variability of interpretations given it by

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6/ Robert F. Schenkkan, Carol M. Thurston, Alan Sheldon. *Case Studies in Institutional Licensee Management.* Washington, 1980.

> the Supreme Court. Since public broadcasting is clearly not subject to the debate about being 'common carriers' of information, its claim and right to protections afforded by the First Amendment should be essentially unequivocal."

But public broadcasters, especially state government licensees, discovered through the court cases on the "Death of a Princess" broadcast, that these unequivocal protections were quite uncertain, and public broadcasting's freedom of editorial discretion might not enjoy the protection of American ideals of free speech and free press. Legal analysis by Nicholas P. Miller, Esq., shows public broadcasting's First Amendment rights to be "unclear," analysis "a tangled web," and the law to be "murky."[7/] Further analysis demonstrates that because of the diversity of licensee types and their governing structures, and the diversity of funding sources, including the government, the independent exercise of editorial discretion by public broadcasting professionals is extremely vulnerable to external pressures from individuals and entities who perceive a vested interest.

Governing boards and/or commissions of pubic broadcasting organizations may be either liable as part of the problem, or capable of being a major part of the solution by insulating the broadcasting professional from any undue external pressures. Board members and commissioners must be aware of the importance of their functional independence

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7/ *Proceedings of the Wingspread Conference on Editorial Integrity in Public Broadcasting*. Southern Educational Communications Association, Columbia, S.C., 1985.

and of the dangers to a democratic society of interference with public broadcasting's editorial discretion.

The Schekkan study suggests a way for trustees to provide program service the public perceives as credible:

> "It is tempting to seek some kind of general document which so defines the role of the station that licensees or others in official position will be discouraged from tampering with the station's activities. . . No state or institution can be compelled to hold such a license and to pay for activities that they do not wish to be associated with; however, once the licensee responsibilities begin, there are public requirements and obligations that must not be subjected to personal pique and whimsy. One device that has been suggested as a means of addressing this matter with some respect and definition would be for the trustees of a licensee to sign a document which would indicate their understanding of the organization's status as a federal license-holder and would elaborate the protocols of station operations."

Participants in the Wingspread Conference on Editorial Integrity in Public Broadcasting arrived at a similar conclusion after considerable debate. At their direction, the principles and the accompanying guidelines in this document were developed. The ultimate goal of these principles and guidelines is to assist trustees of public broadcasting licensee stations to fulfill their vital role in protecting the editorial integrity of public broadcasting in America.

APPENDIX J

THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION

THE ARKANSAS EDUCATIONAL TELEVISION NETWORK

PROGRAMMING POLICY STATEMENT FOR AETN

1. PROGRAMMING DECISION-MAKING

The programming authority for the broadcast service provided by AETN is assigned by the Federal Communications Commission to the Arkansas Educational Television Commission and allocated by them to the Executive Director who as "Editor" may delegate the exercise of this authority to professional staff based on informed programming discretion founded upon the Commission's mission statement, determinations of Arkansas needs, problems, and interests, seasoned judgment, media research, mail/phone comments from viewers and the public, and consultation with television programming experts.

2. CONFORMITY TO FCC RULES AND REGULATIONS, PBS GUIDELINES, AND STANDARD PRACTICES OF THE INDUSTRY

AETN follows all requirements of the Federal Communications Commission which grants the license to operate broadcast facilities. Although industry guidelines and standard practices do not have the force of law, AETN follows a course consistent with contemporary mainstream trends in the public broadcasting field.

3. INSTRUCTIONAL PROGRAMS

AETN believes that the use of television for instructional purposes can contribute significantly to the improvement of education at K-12, higher education, vo-tech education, and adult education levels.

In selecting programs for possible use in support of instruction, AETN screens and evaluates the programs with input from teachers, school administrators, and representatives from state educational agencies: Department of Education, Department of Vo-Tech Education, Section of Adult Education, and Department of Higher Education.

4. GENERAL AUDIENCE PROGRAMS

AETN believe that there is great value . . . in the broadcast sense of the word "educational" . . . in the programs intended for viewing at home by the general public. As a state agency, AETN fulfills a unique role for all Arkansas by providing information, building a better quality of life, and facilitating personal growth and awareness. This kind of television is a life-long learning experience.

5. PROGRAM QUALITY

AETN seeks to obtain the highest quality programs available so that each program or series is regarded as "the best of its kind". There are many aspects of program quality, including but not limited to:

excellence	creativity
artistry	innovation
thoroughness	boldness
credibility	accuracy
fairness	balance
virtuosity	high technical standards
stimulating	enlightening
informative	interesting
challenging	educational, in the broadest sense.

6. EDITORIAL INTEGRITY

AETN is subject to a variety of legal requirements as a holder of the broadcast license from the FCC and as an entity operating under the provisions of the Commissions Act of 1934, the Public Broadcasting Act of 1967, and other statutes.

AETN operates in the constitutionally protected area of public speech, and as a trustee of a public service it maintains a high level of commitment to responsiveness to the issues of the day . . . however controversial the content . . .through journalistically sound TV programs.

To maintain a credible programming effort, AETN acquires or produces and presents and promotes TV programs that meet the needs and satisfies the interest of viewers.

AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources.

AETN bases its public service programming on its value in the marketplace of ideas; not in financial considerations or commercial pressures.

To guide its efforts toward maintaining editorial integrity, AETN applies the principle contained in "Editorial Integrity in Public Broadcasting: Proceedings of the Wingspread Conference (1984)".

7. NON-COMMERCIALISM

AETN fully complies with rules and regulations of the FCC which prohibit educational television stations from selling broadcast time for advertising products or services. Underwriting the cost of program production and presentation is allowed and encouraged following FCC rules and guidelines adopted by the public broadcasting community.

8. NON-SECTARIANISM

AETN will not broadcast any program that proposes acceptance or rejection of any religious dogma or belief. As a state agency, AETN observes the constitutional principle of separation of church and state, and it applies this principle in day-to-day programming decision-making.

9. APOLITICASISM

AETN does not permit its facilities or broadcast time to be used for partisan political purposes by any political organization, office-holder, or candidate for office.

10. DIVERSITY

AETN furthers the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time. In matters of public importance that may be controversial, special attention is invested to assure fairness in treatment of different points of view.

11. ON-AIR FUNDRAISING

AETN seeks funds from its viewers and other who voluntary want to help support its program service. To avoid diffusing these efforts, AETN does not broadcast announcements or programs that intend to raise funds for other organizations.

12. WOMEN AND MINORITIES

AETN provides a bulwark against program domination by any single point of view, and it makes continuing efforts to reflect the pluralism of our society through appropriate representation of women and minorities.

13. PROGRAMS FOR CHILDREN

AETN provides outstanding programs with educational value for pre-school and school-age children for home viewing. Supportive of the formal in-school curriculum, these programs are selected by AETN for their educational value, information content, and appropriate treatment of topics . . . free of stereotypes, gratuitous violence, or commercial exploitation.

14. LOCALLY-PRODUCED PROGRAMS

Although AETN often presents outstanding programs produced elsewhere, the capability for AETN to produce programs by, for, and about Arkansas is a unique opportunity for public service and educational enhancements. Locally-produced programs relevant and responsive to Arkansas needs, problems, issues, and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state.

15. INDEPENDENT PROGRAMS

AETN recognizes that quality programs may be obtained from independent producers outside the public television community. AETN reviews program concepts and screens completed programs that are offered by independent producers and may broadcast such programs that meet otherwise unmet needs.

16. PROGRAM BREAKS

AETN uses the available time between TV programs for non-commercial purposes; following these priorities:

1) Emergency announcements for the public safety

2) Station identification and other notices required by the FCC

3) Underwriting announcements required by the FCC

4) Promotional announcements for upcoming AETN programs

5) Program material to maintain continuity of audience flow

6) Public Service Announcements, according to guidelines.

APPENDIX K

LETTER FROM SUSAN HOWARTH TO RALPH P. FORBES

September 4, 1992

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This is written in response to your letter of August 24 regarding the congressional debate produced, jointly, by AETN and the Associated Press.

Under *47 USC 315*, as interpreted by the Federal Communications Commission and the Courts, debates are exempt from the equal opportunity requirement.

AETN has made a bona fide journalistic judgement that our viewers would best be served by limiting the debate to elected nominees of the two major parties.

Your letter indicates an interest in an administrative appeal of an adverse decision. You should feel free to contact the Fairness/Political Programming Branch of the Enforcement Division, Federal Communications Commission, Area Code 202-632-7586.

Sincerely,

/s/ Susan Howarth

SUSAN HOWARTH
Executive Director

PS: Mail intended for AETN management should be addressed to P.O. Box 1250, Conway, AR 72032. P.O. Box 100 is a bank dropbox and mail so addressed reaches us one to three days after arrival in the Conway Post Office.

APPENDIX L

LETTER FROM RALPH P. FORBES TO SUSAN HOWARTH

FORBES FOR US
* BOX 88 *
* LONDON, AR 72847 *

501-293-4641

August 24, 1992

Ms. Susan Howarth
AETN, President
Box 100
Conway, AR 72032

Dear Ms. Howarth,

Thank you for fulfilling your civic duty by scheduling a debate between the candidates for the office of House of Representatives from the 3rd District of Arkansas.

This is to notify you that I am the certified Independent Candidate for this office, and I am respectfully requesting that I be included on equal terms with my two opponents in this debate.

Because I am a candidate for change, in the past I have experienced some shameful violations of my rights, including party bosses refusing to certify my nomination after I won a statewide primary election by 63% fair and square; being forced into a run-off after I won 53% of the total vote in a 3-way statewide primary in which I carried 72 of Arkansas' 75 counties. The run-off was an illegal election because more than 75% of the voting places required by law to be open were closed in the 72 counties which I carried in the primary. These are only a few of the blatant examples of discrimination, dirty politics and suppression of the democratic process in thousands of pages of court cases in state and federal courts in Arkansas.

It is my experience that the politicians, their fat cat wire pullers, and the special interests that control this state will stop at nothing, no mater how low down, filthy, disgusting and illegal, including censorship, denial of the right to vote via *affirmative action* "elections," conspiring to deny rights under color of law, *ad nauseam*, to prevent the People from replacing these crooks and their tyrannical ilk.

Ms. Hovarth, I am certain that you and AETN want to do the right and fair thing by inviting me and affording me equal opportunity, but I am also sure you will be subjected to tremendous pressures from special interests, scared politicians and the terror squads of "politically correct" bigots to censor me and my ideas. This is especially undesirable as the eyes of the nation and the world will be focused on Arkansas during this presidential election with Governor Clinton being the supreme executive over the publicly owned, Arkansas Education Television Network.

Let me share some of thoughts and words of one of my philosophical mentors that are a strong defense against those who would try to deny the people of Arkansas, especially the 3rd District, from hearing me and my ideas to help them:

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."

Thomas Jefferson, letter to Col. Charles Yancey, Jan. 6, 1816

"Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day.

Thomas Jefferson, Letter to Du Pont de Nemours, April 24, 1816

"I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion."

Thomas Jefferson, Letter to William Charles Jarvis, Sept. 28, 1820

"Men by their constitutions are naturally divided into two parties:

(1) Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist: and in every one where they are

free to think, speak and write, they will declare themselves."

Thomas Jefferson, Letter to Henry Lee, Aug. 10, 1824

"For here we are not afraid to follow the truth wherever it might lead, nor to tolerate any error so long as reason is left to combat it."

Thomas Jefferson

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspaper, or newspapers without government, I should not hesitate a moment to prefer the latter."

Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787

"God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God?

Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever."

Thomas Jefferson, *Notes on the State of Virginia,* Query 6 (1781-1785)

"I have sworn upon the alter of God, eternal hostility against every form of tyranny over the mind of man."

Thomas Jefferson, Letter to Dr. Benjamin Rush, Sept. 23, 1800

The wording of 47 USC 315 is so plain and simple that every ordinary American with the commonsense God

gave him or her knows what it says and that it means I have a right to appear and they have right to hear me so they can make an intelligent, informed choice when they vote.

"I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

James Madison, Speech in the Virginia Convention, June 16, 1788

Unfortunately, in 1983 some lawyers and bureaucrats arbitrarily, misinterpreted the exemption provision, so that ala *1984's "Ministry of Truth"* the law has been turned inside out to nullify its purpose by doing *exactly the opposite of what it says*:

"Affording equal access to all candidates," according to this worm-tongued, truth-twisting theory, "means that those in power may exclude and discriminate against candidates of genuine change."

But double-minded Orwellian double-speak and double-think is, alas, all too common in the Alice in Wonderland created by the politicians and special interest lawyers who run this country as if they were the Mad Hatter, the March Hare and the Queen of Hearts.

To deny anyone equal access is discriminatory and wrong, isn't this true?

To suppress any ideas or censor anyone's expression of opinion is a violation of Free Speech, which I am sure you would not allow to happen.

Ms. Howarth, I would appreciate receiving your reply to my request for equal opportunity and free speech as soon as possible.

Because if the dirty politics I have fought in the past is still doing "bidnis" as usual and if they have the power to pressure AETN to deny me and the people of Arkansas our rights, *then I must have sufficient time to exhaust my "administrative remedies," so I can get any appropriate order from a federal court in time so the people can hear me before the election is over.*

Yours for A Free and Equal Opportunity America,

/s/ Ralph P. Forbes

CC:

FILED
FEB 12 1997
CLERK

No. 96-779

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner

v.

RALPH FORBES,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the government, through its public television station, may hold a debate and exclude a qualified balloted candidate it disfavors.

LIST OF PARTIES

The parties are accurately stated in the caption of this case.

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No. 96-779

IN THE

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1992, Congressman John Hammerschmidt announced his retirement from Congress as representative of the Third Congressional District of Arkansas. For his vacancy, the Republican Party nominated Tim Hutchinson and the Democratic Party nominated John Van Winkel. Obtaining enough signatures under State law and approved by the Secretary of State, Mr. Ralph Forbes qualified as the third and last candidate.[1] Before his qualification, the Arkansas Educational

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[1] Mr. Forbes had also obtained a plurality of votes in earlier various state-wide elections.

Television Network ("AETN"), a media chain created, owned, and operated by the State of Arkansas, decided to sponsor and televise a series of Congressional Debates. These debates included the Congressional race for the Third District. AETN refused Mr. Forbes permission to participate in the debate. He was the only qualified candidate for this race so refused. On the night of the debate, Mr. Forbes traveled to the physical location of the debate and was confronted by Mr. Oscar Eugene Goss of AETN. Mr. Goss not only prevented Mr. Forbes from entering the studio, but also attempted to dissuade the assembled news media from interviewing Mr. Forbes. (R. 128-129.) The debate took place without Mr. Forbes.

Mr. Forbes filed the instant suit. The United States District Court for the Western District of Arkansas, Fort Smith Division, ultimately ruled that the debates did not constitute a limited public forum. The Eight Circuit Court of Appeals overruled and held the government petitioner's actions were in violation of the First Amendment of the United States Constitution. Government petitioner AETN now petitions for Writ of Certiorari to this Court.

SUMMARY OF ARGUMENT

Government petitioner intentionally opened a limited public forum for a debate for the Third Congressional District of Arkansas. It opened government facilities to outsiders to engage in free expression concerning the office in question. The Eighth Circuit Court of Appeals correctly determined that the government's exclusion of the only other qualified candidate from the limited public forum for no compelling governmental reason violated the First Amendment. This holding is consistent with this Court's decisions and public forum analysis.

Petitioner's fear of opening access for "viewers" to contest programming decisions is misplaced. "Viewer" rights are inapposite to the case at bar. The instant case simply involves the

issue of whether the government may hold a debate and then exclude a balloted candidate it disfavors.

The decision to sponsor a debate was made solely by petitioner. Once decided, Mr. Forbes, a balloted Independent candidate, came under the umbrella of protection within the state-created forum. His exclusion violated not only the First Amendment but the purpose of public television itself. Candidates for U.S. office should expect equal access and equal treatment by the government. Any other approach would be dangerous to a free society.

REASONS FOR DENYING THE WRIT

This Court has stated:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

Martin v. City of Struthers, 319 U.S. 141, 143 (1943). Petitioner's approach seeks instead for the government to sponsor debates for the United States Congress and then exclude those candidates it disfavors or feels are not "newsworthy." The government does not have such power over the election choices of its citizens. As the Eight Circuit held: "[w]hether [Mr. Forbes] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Forbes v. AETN*, 93 F.3d 497, 504-5 (8th Cir. 1996). Absent a compelling governmental interest, then, Mr. Forbes should not have been excluded by the government.

I. THE AETN THIRD CONGRESSIONAL DISTRICT DEBATE WAS A LIMITED PUBLIC FORUM CONSISTENT WITH THIS COURT'S DECISIONS AND NOT INCONSISTENT WITH THE ELEVENTH CIRCUIT.

Petitioner contends the debate was not a limited public forum under this Court's decisions, especially *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985). The three types of forums delineated by this Court are the traditional public forum, the limited public forum, and the non-public forum. *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37, 44 (1983). A limited public forum is a place of communication not generally open for public expression, but is an open forum because the government has opened it for a limited period of time or purpose. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981). The debate in question was clearly a limited public forum and not a non-public forum.

Petitioner correctly quotes *Cornelius* on this issue:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.

Cornelius, 473 U.S. at 802-3; Petition for Writ, p.p. 12-13. The intent and action of the government in this case could be no clearer. Government petitioner conceived, staged, and broadcast the debate in question. Under its own factual recitation, they intentionally opened up government property for outsiders to engage in free expression in the limited context of

a Congressional debate. It opened a forum. Its position that the debate is a non-public forum is untenable.

The government spends much time in its petition attempting to establish its intent to exclude Mr. Forbes. This fact Mr. Forbes does not dispute. The government's desire to exclude a candidate does not alter the reality, however, that it created a limited public forum for the congressional debate first. Once the topic or subject matter of the forum is specified, as it was in the instant case, one can easily determine the common area of speech and class of speakers. Government exclusion of a member of the class of speakers for this forum is subject to First Amendment scrutiny.

Petitioner in effect proposes that the government may open a forum on a subject and then tailor or gerrymander out particular individuals or groups it disfavors. This court has always rejected such an approach. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), The University of Missouri at Kansas City opened its facilities and created a limited public forum for student groups. This Court found the government exclusion of one group meeting for religious purposes violated the First Amendment. Although the University was not required to create the limited public forum, and although it could distinguish between student and non-student groups, it could *not* selectively allow favored groups the benefits it denied unpopular groups. *Id.* Even in the shadows of real fears of violating the Establishment Clause, the University could not offer unequal treatment and benefits.

The government did not have to organize the instant congressional debate. Yet, it did. Having done so, it cannot then disfavor and exclude the only other qualified candidate without a compelling justification. Like the University in *Widmar*, once the government designates the forum, unequal treatment is constitutionally suspect. This is especially true in a case concerning the core Free Speech issues of a political

exchange of ideas by a candidate for the United States Congress.

Other than its framework for public forum analysis, *Cornelius* is not similar to the case at bar. In *Cornelius*, an advocacy group sought to be included in an annual solicitation of federal employees analogous to the United Way. This Court found the solicitation to be a non-public forum. This Court pointed out the federal work place exists to accomplish the business of the employer and was not a forum created for expression. *Cornelius*, 473 U.S. at 805. By contrast, AETN's congressional debate for the Third District was intended for the dissemination and exchange of ideas. This was its reason for existence. The Eight Circuit's holding that the debate in question was a limited public forum and not a non-public forum is correct and consistent with this Court's former holdings. Whether petitioner's approach was Mr. Forbes' viability as a candidate, "newsworthiness," or "legitimacy" in the government's eyes, is irrelevant; such standards are insufficient for government exclusion from a First Amendment forum. *See* Petition for Writ, p.p.14-15.

Petitioner also contends that a serious conflict exists between the Eighth Circuit's opinion and *Chandler v. Georgia Public Telecommunication Commission*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 71 (1991), which would require this Court to now take up this issue. Although *Chandler* involves a debate in Georgia where a Libertarian candidate was excluded from public television such a conclusion is not warranted.

First, public forum determinations are mixed questions of fact and law. *Forbes*, 93 F.3d at 502. A determination by one court that a limited open public forum exists, and by another under a separate nucleus of facts that one does not, is insufficient for a conflict even if the facts are very similar. Second, *Chandler* involves a request to stop a television program entirely and thus involved "a decision to broadcast one program." 917 F.2d at 488. Unlike the Eight Circuit decision at bar, *Chandler* thus involved a decision on a request for prior restraint and an

emergency or quick resolution. *Id.* at 488. *Chandler*, in fact, rests most strongly not even on another court's opinion but upon a concurrence by Justice Rubin of the Fifth Circuit. *Id.* The case cited, *Muir v. Alabama Education Television Communication*, 688 F. 2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983), actually only addresses the issue of whether individual "viewers" of public television stations can claim a First Amendment right to compel a program to be aired.[2]

Most importantly, *Chandler* is not useful in creating a strong conflict on public forum analysis. The case itself uses little, if any, forum analysis. This decision, in fact, never makes any specific statement as to which forum the debate is, although one could assume from the decision's result. While the court's succinct decision is understandable in light of the emergency decision placed before the Eleventh Circuit panel, it hardly provides a basis for a clear conflict between the circuits requiring this Court's intervention.

II. MAINTAINING FIRST AMENDMENT CONSTRAINTS ON GOVERNMENT EXCLUSION OF A QUALIFIED CANDIDATE FROM A GOVERNMENT SPONSORED CONGRESSIONAL DEBATE DOES NOT DESTROY DISCRETION OVER PROGRAMMING

Government petitioner brings forward its parade of horribles which it says will result if government exclusions of qualified candidates in their debates are subjected to First

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[2] Mr. Forbes suggests that some confusion as to the Eleventh Circuit's reasoning in arriving at it's holding in *Chandler* is understandable given the peculiar circumstances under which that opinion was rendered. The published opinion reveals that the district court issued its temporary injunction on October 18, 1990, briefs were submitted to the circuit court on an expedited schedule, the case was argued on October 30, 1990 and the appellate opinion was issued the next day. The Eleventh Circuit itself characterizes its written opinion as "succinct". *Chandler*, at 488.

Amendment constraints. Such fears are unwarranted. First, the Eight Circuit did not say the station or all its programs were public forums. It merely said AETN's designated political debates in question were limited public forums. Arguments regarding "viewer access" rights to question programming are thus inapposite. The Eighth Circuit's decision in no way extends First Amendment rights to viewers to question programming decisions. While such questions may arise in some future case, they are not implicated by the instant decision.

The instant case actually opens a much smaller door and creates less of a threat than the usual equal access case. Other forum cases would more likely provide the opportunity for the multitudes to enter the forum. In the instant situation, those seeking access would be very limited. In fact in the case at bar, Mr. Ralph Forbes would be the only one. Allowing such access to government debates by qualified candidates would hardly open the floodgates to the masses.

The unfettered discretion which the government seeks over programming is not supported by the case upon which it relies. The *Chandler* case provides little support for the boundless discretion the government seeks in all programming. It states that the use of government television stations "to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention." 917 F. 2d at 489. Such an approach would clearly invite First Amendment scrutiny of any programming decision by the government, an approach much more broad than the narrow decision set forth by the Eighth Circuit in the instant case. The instant issue is simply about government exclusion of candidates from government debates, not the rights of "viewers."

III. EVEN IF NO FORUM HAD EXISTED, THE ACTIONS OF GOVERNMENT PETITIONER WERE NOT REASONABLE

Not only was Mr. Forbes' viability as a candidate a matter to be determined by the people and not by government

officials in charge of the channels of communication, but those official actions taken were actually unreasonable. The supposed basis for the existence of governmental broadcasting is its inclusivity and presentation of excluded views. "If PBS does not do it, who will?" is the slogan of PBS. It is unreasonable under the government stations' purposes of inclusivity and presenting excluded views to exclude a qualified candidate from its debate because he or she is "marginal."

The necessity for public debate is perhaps most evident when impacting "the ability of the citizenry to make informed choices among candidates for office." *Kennedy for President Committee v. F.C.C.*, 636 F. 2d 417, 420 (D.C. Cir. 1980), (citing *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The electorate is invigorated by hearing competing opinions, competing proposals to address weighty public concerns, and to otherwise be informed. In fact, it could be said that a First Amendment requirement of inclusion of a balloted candidate in a state-sponsored debate lies at the heart of the rationale for broadcast licensing of a state in the first place. While private broadcasters can include and exclude candidates at will, *state-owned* broadcasters exist to fill a broader, non-profit need, i.e., the need for public interest programming that cannot be otherwise obtained by the electorate. The State's exclusion of Mr. Forbes from its debate was, again, unreasonable in light of its distinguishing purpose for existence.

Additionally, the petitioner's decision that Mr. Forbes was not "newsworthy" was itself irrational. In elections, the change of a vote means both one candidate's gain and another's loss. A candidate who has received a plurality of votes in previous state-wide elections can win or lose an election for the other candidates. Mr. Forbes candidacy was thus certainly newsworthy, possibly affecting the outcome of the

election even if he did not win.[3] His exclusion because he was not newsworthy is thus insupportable.

For a state-owned broadcaster to unilaterally decide which candidates are "serious" or to entrench the political parties it chooses is itself dangerous and undermines the entire democratic process. This Court has consistently asserted its commitment to the principle that "debate on public issues should be uninhibited, robust, and wide open." *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Nowhere is this more crucial, as the Eighth Circuit appropriately stated, than "with political speech by legally qualified candidates... and the exclusion of one such speaker has the effect of a prior restraint -- it keeps his views from the public on the occasion in question." *Forbes*, 93 F.3d at 504. The government did not have to sponsor a debate. It did, however. Once the debate for the Third Congressional seat was set, a forum was opened. The subsequent exclusion of the only other qualified candidate by the government violates the First Amendment. The government has neither a compelling interest, nor even a reasonable justification for its exclusion. Petitioner's actions in fact go against the very reason for its existence.

Such governmental approval of some qualified candidates and disfavor of others is a dangerous practice. The Eighth Circuit's holding is not only constitutionally warranted but also healthy for the country.

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[3]Petitioner's other argument was that Mr. Forbes was excluded because he had only raised $9,000. This argument is not rational. In a similar debate for a vacancy on the Second District, the Republican nominee was invited by petitioner despite his raising of only $6,000 and facing a powerful Democratic opponent. (R. 259-60.)

CONCLUSION

Government petitioner intentionally opened a limited public forum for a debate for the Third Congressional District of Arkansas. It opened government facilities to outsiders to engage in free expression concerning the office in question. The Eighth Circuit Court of Appeals correctly determined the governmental exclusion of the only other qualified candidate from the limited public forum for no compelling governmental reason to be in violation of the First Amendment. This holding is consistent with this Court's decisions and public forum analysis.

Petitioner's fear of opening access for "viewers" to contest programming decisions are misplaced. "Viewer" rights are inapposite to the case at bar. The instant case simply involves the issue of whether the government may hold a debate and then exclude a candidate it disfavors.

The decision to sponsor a debate was made solely by petitioner. Once decided, Mr. Forbes, a balloted Independent candidate, came under the umbrella of protection within the state-created forum. His exclusion violated not only the First Amendment but the purpose of public television itself. Candidates for U.S. office should expect equal access and equal treatment by the government. Any other approach would be dangerous to a free society.

Supreme Court, U.S.
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(5)

No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S REPLY BRIEF

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February 21, 1997

5 pp

The central issue in this case is whether journalists at a public station licensed to a state agency and insulated from state political influence can exercise the same news judgment as journalists at other broadcast stations in organizing and broadcasting a bona fide news event. On this point, *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991), and *Forbes v. Arkansas Educ. Television Comm'n.*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*") (App. 1a), reach diametrically opposite conclusions of law. *Chandler* holds that a candidates' debate organized and televised by a state-entity public broadcaster is a non-public forum, from which fringe candidates can be excluded; *Forbes II* holds that such a program is a limited public forum in which fringe candidates must be allowed to participate.

Respondent fails to identify any meaningful factual difference between the case below and *Chandler*. The district court in *Chandler* had enjoined the Georgia Public Telecommunications Commission ("GPTC") from televising two debates unless a Libertarian candidate was included in each. *Chandler*, 917 F.2d at 488. Similarly, Forbes sought an injunction mandating his inclusion in the debate organized by the Arkansas Educational Television Network ("AETN"). *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423, 1426 (8th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 500 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes) ("*Forbes I*") (App. 25a, 29a). Both cases originated in requests for preliminary relief.

Respondent also asserts (Opposition Brief at 6-7) that no circuit conflict exists because *Chandler* relies on *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983), which dealt with individual viewers' claims of a right of access to state-owned

public television stations.[1/] Respondent misses the fact that *Muir's* analysis is based on the role that the state selects for its public television stations — that is, the state's *intent* to create a non-public forum television station so that the licensee can exercise programming judgment over each program in order to meet the public interest standard in Section 309 of the Communications Act, as interpreted by the FCC. *See also United States v. Grace*, 461 U.S. 171, 178 (1983) (government has power to preserve property under its control "for the use to which it is lawfully dedicated.") In other words, Respondent fails to confront the fact that a broadcast station, and each program on the station (except for exempt political "uses"[2/]), are quintessential non-public forums, no matter the identity of the licensee. Respondent seeks a rule that ignores the evidence of Arkansas' intent — the intent inherent in a state's seeking a television license under the Communications Act. This is the very point that the Eighth Circuit failed to analyze below.

1/ Respondent errs in disdaining *Chandler's* reliance on Judge Rubin's concurrence in *Muir*. Under this Court's precedent, Judge Rubin's opinion, the narrowest concurrence in a case with no majority opinion, is the holding of the case and the law of the circuit. *See, e.g., Marks v. United States*, 430 U.S. 188, 193 (1977), *cited in Schneider v. Indian River Community College Found.*, 875 F.2d 1537, 1541 (11th Cir. 1989).

2/ A "use" under Section 315 of the Communications Act, 47 U.S.C. 315, cannot be censored by the licensee. *See, e.g., Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

Respondent asserts a novel rule of forum analysis: "Once the topic or subject matter of the forum is specified . . . one can easily determine the common area of speech and class of speakers." (Opposition Brief at 5.) This rule, while a fair restatement of the Eighth Circuit's doctrine in *Forbes II*, 93 F.3d at 504 (App.14a-15a), starkly conflicts with the command in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985), and *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983), that the starting point for determining the type of forum is the state's intent in creating the type of forum, not its intent in selecting the subject matter to be discussed in the forum. Only after the type of forum is determined does one analyze whether "a topic [is] not encompassed within the purpose of the forum" or whether an individual seeking access "is not a member of the class of speakers for whose especial benefit the forum was created." *Cornelius*, 473 U.S. at 806 (citations omitted). Consequently, Respondent emphasizes both the circuit conflict and the important conflict between *Forbes II* and this Court's forum decisions.

Respondent says four times that AETN "disfavor[ed]" Forbes (Opposition Brief at 3, 5) but the record refutes this assertion, and the jury specifically found to the contrary. Respondent also argues that, in another District, a candidate who raised only $6,000 was invited to debate (Opposition Brief at 10 note 3). But the amount of money raised was only one of many factors AETN considered in concluding that Forbes was not newsworthy.

Respondent says it is "unreasonable," "irrational" and "dangerous" for a station to exclude certain candidates (Opposition Brief at 9, 10). To the contrary, it is all that and more for the judiciary to force any television licensee to conduct a debate with the participation of every candidate who

can garner enough signatures to get on the ballot. The fact that, in this particular case, only one candidate was excluded is irrelevant. Even Respondent does not argue that there should be one rule for debates where only three candidates are running and another for races with a greater number of candidates.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 96-779

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
PETITIONER

v.

RALPH P. FORBES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, when providing news-related programming to the communities they serve, broadcast stations licensed to governmental entities are subject to First Amendment limitations inapplicable to broadcast stations licensed to private entities.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-779

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
PETITIONER

v.

RALPH P. FORBES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

The Federal Communications Commission (FCC) is the agency to which Congress has delegated the authority to regulate the broadcast industry under the Communications Act of 1934. See 47 U.S.C. 151 *et seq.* Congress and the FCC have committed substantial public resources—in the form of frequency allocations and federal funds—to the development of noncommercial educational broadcasting (commonly referred to as "public broadcasting"). In so doing,

Congress and the FCC have acted on the premise that the employees of all public broadcasting stations, of which more than two-thirds are licensed to state entities, will exercise the same editorial discretion over the content of their programming as their counterparts in private commercial broadcasting. In holding that the First Amendment constrains the editorial decisions of a state-entity licensee, however, the court of appeals' decision in this case threatens the premise underlying the federal regulatory scheme. The Commission and the United States therefore have a substantial interest in the outcome of this case.

STATEMENT

1. a. Before passage of the Radio Act of 1927, ch. 169, 44 Stat. (Pt. 2) 1162, "the allocation of [broadcasting] frequencies was left entirely to the private sector, and the result was chaos." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375 (1969). Congress recognized that unless the federal government regulated access to the airwaves, each speaker would be drowned out by a "cacophony of competing voices." *Id.* at 376. Congress thus enacted the Communications Act of 1934, ch. 652, 48 Stat. 1064, "to protect the public interest in communications," *Scripps-Howard Radio Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), by formulating "a unified and comprehensive regulatory system for the industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress assigned enforcement responsibility under this new regulatory scheme to the FCC.

Broadcasters are granted station licenses for terms of up to eight years. 47 U.S.C. 307(c) (to be codified at Supp. II 1996). The Commission may grant

and subsequently renew such licenses only after finding that doing so will serve the public interest, convenience or necessity. 47 U.S.C. 303, 307(a) and (c), 309(k) (to be codified at Supp. II 1996). The "policy of the Act is clear that no person is to have anything in the nature of a property right as the result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

A central element of this regulatory scheme is the responsibility of the individual licensee, whether a governmental or private entity, to act as a public trustee. A broadcasting license is a public trust. The licensee obtains "the free and exclusive use of a limited and valuable part of the public domain" and, in return, assumes a duty to serve the public interest. See *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). As one sponsor of a predecessor to the Communications Act observed 70 years ago, "[t]he right of the public to service is superior to the right of any individual * * *. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White). Similarly, in amending the Communications Act in 1959, Congress reaffirmed the public trust concept as the animating principle underlying the Act: "[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest." S. Rep. No. 562, 86th Cong., 1st Sess. 8 (1959); accord *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. at 375-377; *Office of Communication of the United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

The "ability of the licensee to render the best practicable service to [its] community" is crucial to the Commission's licensing decisions. *Sanders Bros.*, 309 U.S. at 475. Specifically, a broadcaster must direct issue-responsive programming to the identified needs of its community. See *Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), reconsid. denied, 104 F.C.C.2d 357 (1986), aff'd in relevant part *sub nom. Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968, reconsid. granted in part, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Failure to meet that requirement can lead to the denial of a broadcaster's renewal application. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975).

Each licensee must itself undertake, and therefore may not delegate, the "primary duty and privilege to select the material to be broadcast to his audience." *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2311-2312 (1960); see also *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 599-600 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973). The FCC "has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee," *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967), and has expressed strong disapproval of any decision by a licensee to relinquish control over portions of its programming. See, *e.g.*, *Trustees of the University of Pennsylvania*, 69 F.C.C.2d 1394 (1978); *Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558 (1976), rev'd on other grounds, 581 F.2d 917 (D.C. Cir. 1978); *Carol Music, Inc.*, 37 F.C.C. 379, 380, 400 (1964).

b. "The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." *FCC* v. *League of Women Voters*, 468 U.S. 364, 367 (1984); see also S. Frost, *Education's Own Stations* 464 (1937). Between 1921 and 1936, the federal government issued approximately 200 radio broadcast licenses to educational institutions, many of which were public. See *id.* at 2-5. When the FCC first reserved frequencies for noncommercial educational television use, it assumed that many public broadcasting facilities would be licensed to and financed by state and local governmental entities. See *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock). Approximately two-thirds of noncommercial educational broadcast stations are now licensed to governmental entities. See *FCC* v. *League of Women Voters*, 468 U.S. at 393 n.22.[1]

With few exceptions, noncommercial stations are subject to the same regulatory standards and require-

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[1] Since 1962, the federal government has provided substantial government funding for noncommercial educational broadcasting. See Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64; Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365; see also *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 292 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). Although governmental entities typically seek licenses to operate noncommercial educational stations, they may, and occasionally do, operate commercial stations as well. See, *e.g.*, *Applications of Iowa State Univ. Broadcasting Corp.*, 9 F.C.C. Rcd. 481 (1993), aff'd mem. *sub nom. Iowans for WOI* v. *FCC*, 50 F.3d 1096 (D.C. Cir. 1995); G. Gordon, *Educational Television* 9 (1965).

ments as commercial stations.[2] In particular, the FCC has addressed, and has specifically rejected, the position that the editorial decisions of state-entity broadcast licensees are subject to greater legal constraints than the decisions of any other licensee. The Commission reasoned that, because there is no constitutional right of access to a broadcast station, and because Congress refused to treat broadcasters as common carriers, state-entity licensees have both the same public trustee responsibilities and the same editorial discretion as private licensees. For that reason, the Commission concluded that the "public forum doctrine" is not applicable to, and the First Amendment does not restrict, a state-entity licensee's choice and selection of programming. See *Mississippi Auth. for Educ. Television*, 71 F.C.C.2d 1296, 1303 n.12 (1979); *City of New York Municipal Broadcasting Sys.*, 56 F.C.C.2d 169, 170 (1975).

2. This case concerns the constitutionality of a decision by the Arkansas Educational Television Network (AETN) to sponsor and broadcast a 1992 debate between the two leading candidates for a seat in the United States Congress. Petitioner Arkansas Educational Television Commission, an Arkansas state agency, operates AETN. AETN did not invite respondent Ralph P. Forbes, an independent candidate for the congressional seat at issue, to participate in the debate. That decision rested not on any disagree-

[2] See *FCC* v. *League of Women Voters*, 468 U.S. at 367; *Muir*, 688 F.2d at 1040; *Accuracy in Media*, 521 F.2d at 291. The exceptions are a ban on supporting or opposing any candidate for office; a requirement that such stations operate on a noncommercial, nonprofit basis; and a general prohibition against selling time or accepting advertising. See 47 U.S.C. 399, 399b; 47 C.F.R. 73.621.

ment with respondent's political viewpoint, but on his lack of public support, the absence of public interest in his candidacy, and his negligible chance of electoral success. See Pet. 2-3, 6, 14-15; Pet. App. 8a-9a.

Although candidates seeking airtime on any broadcast station may pursue various statutory remedies under the Communications Act by filing a complaint with the FCC, see pp. 15-17, *infra*, respondent filed no such complaint and instead sought relief directly in federal district court, asserting, among other things, a First Amendment right to participate in the debate. The district court dismissed the suit for failure to state a legally valid claim, and respondent unsuccessfully sought preliminary injunctive relief in the court of appeals. See Pet. App. 43a-44a.

Sitting en banc to hear respondent's appeal on the merits, however, the Eighth Circuit remanded the case to the district court for further proceedings. Pet. App. 25a-42a (*Forbes I*). It held that AETN is a state actor, that it "is faced with constraints not shared by other television stations," that respondent had "a qualified right of access created by [petitioner's] sponsorship of a debate," and that petitioner "must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Id.* at 33a-34a. The court suggested that whether or not petitioner's "reason" was "strong enough" turned on whether the debate should be characterized as a "nonpublic" or, alternatively, as a "limited public" forum, an issue that the court remanded to the district court. *Id.* at 34a-37a. This Court denied certiorari. 115 S. Ct. 500 (1994).

On remand, the district court found as a matter of law that the debate was a nonpublic forum. See Pet. App. 6a. The court also submitted to the jury special

interrogatories asking whether the decision to exclude respondent from the debate was influenced by political pressure or disagreement with respondent's views. The jury answered those questions in the negative. See *id.* at 7a-9a. Based on those findings, the district court ruled for petitioner.

The court of appeals reversed. Pet. App. 1a-18a (*Forbes II*). The court accepted the jury's determination that the decision to exclude respondent from the debate was viewpoint-neutral and free of influence from political pressure. See *id.* at 7a-9a. Indeed, it specifically found that the decision to exclude petitioner "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nonetheless, although the court acknowledged (*id.* at 15a) that petitioner had never intended to open the debate to all legally qualified candidates, it held that the debate was nonetheless a "limited public forum" and that petitioner was without authority to exclude peripheral candidates: "Whether [respondent] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Id.* at 14a-16a. Finding that petitioner's reason for excluding respondent from the debate was "neither compelling nor narrowly tailored," the court reversed and remanded for an assessment of damages. *Id.* at 17a-18a.

On September 25, 1996, Justice Thomas denied petitioner's application to stay enforcement of the Eighth Circuit's decision pending the filing of a petition for certiorari. See Pet. 8. On September 26, 1996, the Eighth Circuit, in denying petitioner's motion to stay its mandate, issued a one-paragraph clarification of

its earlier decision. Pet. App. 19a. The court stated that petitioner remains free, "to the extent provided by law," to cover "bona fide news events," including candidate debates, that are "organized by people or groups other than [petitioner]." *Ibid.* The court added that its earlier decision did not necessarily require petitioner to invite write-in candidates to participate in any debate that it sponsored. *Ibid.*

DISCUSSION

The court of appeals' decision creates a circuit conflict on a question of substantial national importance: whether the editorial decisions of state-entity broadcast licensees are subject to stringent First Amendment constraints inapplicable to other broadcast licensees. This Court should grant certiorari to resolve that conflict and preserve the editorial discretion that state-entity licensees have traditionally exercised over the content of their news programming.

1. The court of appeals held that a state-entity licensee, when sponsoring a political debate for the benefit of the viewers in its community, may not limit the participants to candidates who have demonstrated a realistic chance of electoral success, but must also invite every legally qualified candidate—no matter how peripheral—for the elective office at issue. That decision, which will undoubtedly lead many state-entity licensees to abandon their sponsorship of such debates in the future, is in direct conflict with *Chandler* v. *Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (11th Cir. 1990), cert. denied, 502 U.S. 816 (1991).

In *Chandler*, Libertarian Party candidates for Georgia state office sought to enjoin a political debate

between the Democratic and Republican candidates sponsored by, and broadcast on stations licensed to, the Georgia Public Telecommunications Commission (GPTC), a state entity. The Eleventh Circuit observed that GPTC, like all other broadcast licensees, was required under federal law to serve the viewing needs of its community, and that GPTC's employees therefore had to make daily editorial decisions about programming content. 917 F.2d at 488. The court found that, although GPTC had " 'regulated content' by making a decision to air debates between candidates of the major parties," that decision was constitutionally permissible because it was reasonably designed to, and did in fact, meet GPTC's obligation to air programming "of the most interest and benefit to the citizens of Georgia." *Id.* at 489.

In this case, the Eighth Circuit acknowledged that the decision to exclude respondent from the debate was "made in good faith" and is "exactly the kind of journalistic judgment routinely made by newspeople." Pet. App. 16a. Moreover, the court accepted (see *id.* at 7a-10a) the jury's determination that that decision was not influenced by political pressure and was not "based on disagreement with [respondent's] political viewpoint." *Id.* at 9a; compare *Chandler*, 917 F.2d at 489 (GPTC's decision to exclude Libertarian candidates was "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's views") (internal quotation marks omitted). In the court of appeals' view, however, those facts are irrelevant; the "crucial fact," it held, "is that the people making this judgment were not ordinary journalists: they were employees of government." Pet. App. 16a. In so holding, the court made final its earlier decision, in *Forbes I*, to "dis-

agree with the Eleventh Circuit's conclusion [in *Chandler*] that the First Amendment was not implicated by the Georgia public television station's actions." *Id.* at 37a n.4.

The Eighth Circuit's decision is also in tension with *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983). In that case, the Fifth Circuit upheld the authority of a state public broadcasting network to decide, on content-based grounds, not to broadcast a particular program. The *Muir* court rejected arguments that the state network's broadcast operations constituted a public forum for First Amendment purposes. As the court explained, "[t]he pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority. The general invitation extended to the public is not to schedule programs, but to watch or decline to watch what is offered." 688 F.2d at 1042.

2. In our view, the decisions of the Eleventh and Fifth Circuits in *Chandler* and *Muir* are correct, and the contrary decision of the Eighth Circuit in this case should be reversed. The political debate at issue here was not a "public forum," limited or otherwise, nor did petitioner violate the First Amendment by limiting that debate to those whose candidacies have attracted significant public support or interest.

a. "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). Instead, Congress relied on the diverse editorial decisions of individual broadcasters, combined with

each broadcaster's statutory duty to serve the needs of its viewing community, to ensure a rich marketplace of ideas in television broadcasting. *Id.* at 120-121. "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." *Id.* at 124-125.

Thus, "if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust." *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984); accord *CBS, Inc.*, 412 U.S. at 120-121. That principle is no less applicable to state-entity licensees than to any other licensee. The Communications Act and the FCC's detailed regulatory scheme require every licensee, whether public or private, to use its own editorial discretion to serve the public interest. See pp. 3-6, *supra*. No broadcaster may cede that responsibility to members of the general public. See *CBS, Inc.*, 412 U.S. at 108-114; see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier"); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

A broadcaster's responsibility to exercise editorial control and judgment over the content of its programming is therefore inconsistent with any characterization of broadcasters, or of the programs each broadcaster airs, as "public forums." A structured debate between the two major candidates for a given political office, sponsored and aired by a state-entity licensee, is a news program designed to meet the

viewing needs of the licensee's broadcast community. See generally 47 U.S.C. 315(a)(1)-(4); *King Broadcasting Co.* v. *FCC*, 860 F.2d 465 (D.C. Cir. 1988); *In re Requests of Fox Broadcasting Co.*, 11 F.C.C. Rcd. 11,101 (1996). A news program can in fact meet those needs only if, as Congress intended, the sponsoring broadcaster exercises its journalistic discretion to exclude material that would detract from the program's overall effectiveness. Such programs are not, and cannot be equated with, government property opened up for untrammeled expression by a broad variety of individual speakers, cf. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 655 (1981), and they therefore do not create a right of access to every peripheral candidate who wishes to appear on television.[3]

Indeed, carried to its logical conclusion, the court of appeals' contrary analysis would appear to apply not just to candidate debates, but to a broad range of other programming that has traditionally fallen within a broadcaster's editorial discretion. For exam-

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[3] In any event, petitioner's viewpoint-neutral decision to exclude non-major candidates was reasonably calculated to preserve the character of the debate as an efficient means for community viewers to learn the positions of the principal candidates. For that reason, even if the debate could properly be characterized as a limited public forum, which it cannot, petitioner's decision to exclude respondent would be constitutional. See *Rosenberger*, 115 S. Ct. at 2517 (speech restrictions in limited public forum must be viewpoint-neutral and "reasonable in light of the purpose served by the forum") (internal quotation marks omitted).

ple, any state-entity licensee that airs an interview with a political candidate as part of its nightly news broadcast could arguably be required, under the Eighth Circuit's reasoning, to air a separate interview of every rival candidate who seeks equal public exposure.[4] Indeed, taken at face value, the Eighth Circuit's decision would seem to grant rights of television access not just to aggrieved candidates, but to anyone with a view about a matter of public controversy. If "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a), then, arguably, anyone could demand airtime to respond to the views

[4] The Eighth Circuit recently agreed to en banc consideration of whether a state-entity licensee may sponsor and air news programs featuring interviews with the "major candidates" for political office. See *Marcus* v. *Iowa Pub. Television*, initial hearing en banc granted, No. 96-3645SIDM (Dec. 10, 1996). A divided panel of the Eighth Circuit had earlier denied preliminary injunctive relief to non-major candidates who sought to appear on those programs; it reasoned that, even if the programs at issue are limited public forums, the state-entity licensee likely has a "compelling interest" in "limiting access to newsworthy candidates." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1144 (1996). In analysis that a dissenting judge characterized as an effort "to distinguish the indistinguishable," *ibid.* (Beam, J., dissenting), the panel majority explained its tentative departure from the decision in this case on the ground that, "[u]nlike 'viability,' which is ultimately for the voters to decide, 'newsworthiness' is peculiarly a decision within the domain of journalists." *Id.* at 1142. Because the Eighth Circuit is unlikely to overrule its decision in the present case, this Court should grant certiorari to resolve the conflict between the Eighth and Eleventh Circuits on the issue presented; in the alternative, we suggest that the Court hold this case pending the Eighth Circuit's disposition of *Marcus*.

expressed by anyone else interviewed in a televised news program sponsored by a state-entity licensee.

Even if confined to the context of candidate debates, however, the court of appeals' decision will harm public awareness of, and discussion about, political contests throughout the United States. The value of a debate does not necessarily increase with the number of participants; as common sense suggests, the inclusion of too many participants could make almost any debate unwieldy and uninformative. As a practical matter, the court of appeals' decision could well lead many state-entity licensees simply to abandon plans to sponsor candidate debates. That is not just an abstract concern. As petitioner observes (Pet. 11), the Nebraska Educational Telecommunications Network recently canceled a senatorial debate because it feared that, under the decision below, it would have to invite all minor candidates who wished to appear alongside the major contenders. Such consequences are unfortunate: not just for state-entity licensees themselves, but, more significantly, for the innumerable American citizens who rely on such licensees to sponsor televised debates among the principal candidates for federal, state, and local offices.

b. The court of appeals' decision appears to rest, at least in part, on the concern that state-entity licensees would exclude minor candidates from televised debates for impermissible reasons. See, *e.g.*, Pet. App. 4a (*Forbes II*) (permitting state-entity licensee to exclude non-major candidates from debate would "place too much faith in government"); see also *id.* at 34a (*Forbes I*) (expressing concern that state-entity licensee might "exclude all Republicans, or all Methodists, or all candidates with a certain point of view"). But Congress has already addressed that specific

concern—which, for the reasons explained above, is not of constitutional dimension in any event—in a detailed statutory scheme.

Although the Communications Act leaves most political programming to each broadcaster's own editorial discretion, it does give all legally qualified candidates the right to make use of broadcast stations in certain circumstances. Specifically, Section 312(a)(7) confers on all federal candidates a limited right of "reasonable" access to the airwaves, and Section 315 provides that if any legally qualified candidate for public office "use[s]" a broadcast station, other candidates for the same office must be given an "equal opportunit[y]" to use that station as well. See 47 U.S.C. 312(a)(7), 315; see generally *CBS, Inc.*, *supra*; *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 422-424 (D.C. Cir. 1980).

The Act generally exempts bona fide news coverage from the equal opportunity requirement. See 47 U.S.C. 315(a)(1)-(4). The Commission has therefore held that airing a candidate debate usually does not obligate a broadcaster to provide equal opportunities to excluded candidates. See *Aspen Institute*, 55 F.C.C.2d 697 (1975), aff'd *sub nom. Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983); see also *American Independent Party*, 62 F.C.C.2d 4, aff'd mem. *sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir. 1976), cert. denied, 430 U.S. 955 (1977). Nonetheless, where a broadcaster does decide to exclude legally qualified candidates from a televised debate that it sponsors, the exemption applies only if that decision rests on the broadcaster's good-faith journalistic judgment and not on a desire to promote or suppress the views of a particular candidate. See

generally *Chisholm* v. *FCC*, 538 F.2d at 358-360; *Henry Geller*, 95 F.C.C.2d at 1242; *Cyril E. Sagan*, 1 F.C.C. Rcd. 10 (1986); *Brown for President Comm.*, 75 F.C.C.2d 609, 613-614 (1980); *Andrew J. Watson*, 26 F.C.C.2d 236 (1970); *Constitutional Party*, 14 F.C.C.2d 255 (Broadcast Bureau), reh'g denied, 14 F.C.C.2d 861 (1968); *Conservative Party*, 40 F.C.C. 1086 (1962).

In sum, Sections 312(a)(7) and 315, together with the Commission's detailed implementing regulations, ensure that all legally qualified candidates will have fair and reasonable opportunities to present their views on television. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd. 678 (1991), reconsid. denied, 7 F.C.C. Rcd. 4611 (1992). Respondent was free to pursue his rights under those provisions by filing a complaint with the FCC, a procedure that he chose to forgo. See Pet. App. 31a-32a. Any future candidate, however, may invoke those statutory remedies to challenge an unfair denial of access to the airwaves. The availability of those remedies belies the court of appeals' concern that state-entity licensees could irremediably deny candidates a full and fair opportunity to present their messages directly to the viewing public.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 96-779

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH F. FORBES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE, AND ORGANIZATION OF STATE BROADCASTING EXECUTIVES IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-779

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

v.

RALPH P. FORBES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE, AND ORGANIZATION OF STATE BROADCASTING EXECUTIVES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Amici the Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), and the Organization of State Broadcasting Executives ("OSBE") collectively provide representation, programming, program distribution, related services, and financial support to the Nation's public television and radio stations -- two thirds of

which, like the petitioner in this case, are licensed to state or local government entities.[1]

APTS and PBS are nonprofit membership organizations whose members collectively include 175 licensees representing approximately 350 public television stations in all 50 states. OSBE is a membership organization composed of the chief executives of television and radio stations licensed to state and local government entities. CPB is a private, nonprofit corporation authorized by the Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399, to allocate federal funds to promote public television and radio broadcasting in the United States. *Id.* at § 396.

As discussed in more detail below, the state-owned broadcast stations that amici represent and support are substantially and adversely affected by the Eighth Circuit's decision herein. The lower court's ruling limits sharply the ability of public broadcast stations to sponsor candidate debates that, in their good faith editorial judgment, will best serve the public interest. Not only does the decision affect the many stations bound by it, but the resulting conflict among the courts of appeals has given rise to uncertainty that will have a devastating effect on broadcaster decisions to televise debates in federal, state and local elections throughout the country. Amici therefore are directly affected by the Eighth Circuit's ruling and submit this brief to urge the Court to resolve the circuit conflict.

This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from the Eighth Circuit Court of Appeals' holding that a congressional candidate debate sponsored by the Arkansas Educational Television Commission ("AETC") to be aired on the Arkansas Educational Television Network

[1] Not all noncommercial broadcast stations are licensed to governmental bodies, but for purposes of reference herein, such stations generally will be labeled public broadcast stations.

("AETN")[2] is a "limited public forum" and that the First Amendment prohibits the Network's stations from making a good faith editorial decision to include in such debates only viable candidates whose participation will be of interest to the viewing public.

The facts are set forth fully in the Petition and will not be repeated here, except to point out that, under Arkansas law, a candidate needs only 2,000 petition signatures to secure a place on the congressional ballot. Ark. Code Ann. § 7-7-103(c)(1). It is undisputed in this case that, although Forbes attained ballot status, he had no campaign headquarters and no campaign staff, had raised little money, and had attracted no public support or media interest. Forbes Tr. Trans. 147-155, 172-173. At trial, the jury found in response to special interrogatories that the decision not to include Forbes in AETN's televised debate did not result from political pressure and was not motivated by disagreement with Forbes' views. *Forbes* v. *Arkansas Educ. Television Comm'n*, 93 F.3d 497, 501-502 (8th Cir. 1996) ("*Forbes II*").

Even the Court of Appeals agreed that AETC's judgment "was made in good faith" and involved "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 505. Nevertheless, the court characterized the exclusion of any candidate who attains ballot status as a bureaucratic "ipse dixit" and held that each "qualified" candidate potentially has a First Amendment right to compel access to debates on public broadcast stations. *Id.* at 504. Thus, state-owned television or radio stations may not sponsor a debate to inform the electorate about the major issues in such elections without inviting every candidate on the ballot to appear -- regardless of how little public interest some candidacies have generated, and regardless of how the resulting cacophony of voices would distract from the issues that are important to most voters.

[2] AETN is the public television network of the State of Arkansas and is dedicated to making the benefits of public television available to all the people of the State. AETN is governed by the AETC, an agency of the State of Arkansas.

SUMMARY OF ARGUMENT

The decision below is in direct conflict with the Eleventh Circuit's ruling in *Chandler* v. *Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990) (per curiam), *cert. denied*, 502 U.S. 816 (1991), where, on almost identical facts, the court held that a candidate debate on a public television station is not a public forum. *Forbes II* created this conflict by misreading and misapplying the public forum doctrine to encompass political debates on AETN.

Contrary to the Eighth Circuit's reasoning, the fact that "employees of the government" were involved in making an editorial decision has never been the *sine qua non* of public forum status, nor has the use of governmental property or funding been dispositive. A limited public forum does not exist simply because governmental property is compatible with communicative uses, or because some speakers have been permitted to use the property. Instead, the government must intend to open the forum for the benefit of speakers to disseminate their views without editorial oversight. Such intent does not exist where, as here, the presentation of political speech is part of a journalistic enterprise.

The Eighth Circuit's finding that these circumstances create public forum status will severely limit the ability of public stations to present debates and will undermine First Amendment values. The ease with which candidates may attain ballot status in many states means that debates open to all "legally qualified" candidates often will be, at best, unwieldy and uninformative, and, at worst, wholly unmanageable. Indeed, even in the brief period since the decision below, at least one public broadcast station faced with this impractical obligation has canceled a scheduled debate.

Even if this Court agrees with the Eighth Circuit that AETN's debate is a limited public forum, it should clarify that AETC's decision to invite only viable and newsworthy candidates was a reasonable exercise of journalistic judgment.

It is undisputed that AETC's decision to invite the major party candidates was not based on political favoritism or on disagreement with Forbes' views. Contrary to the decision in *Forbes II*, AETC's exercise of editorial judgment provides a far superior basis for deciding the composition of televised debates, just as the Eleventh Circuit held in *Chandler*. It is imperative that this Court review the *Forbes II* decision to prevent further confusion and to assure that broadcaster decisions to offer candidate debates for the viewing public are not chilled.

ARGUMENT

I. THE EIGHTH CIRCUIT'S HOLDING THAT A PUBLIC TELEVISION STATION'S CANDIDATE DEBATE IS A LIMITED PUBLIC FORUM CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND IS CONTRARY TO THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

a. *Forbes II*, the decision below, conflicts squarely with the Eleventh Circuit's holding in *Chandler*. On almost identical facts as the instant case, the *Chandler* court held that no public forum is created when a public television station hosts a candidate debate. 917 F.2d at 489. The Eleventh Circuit emphasized that treating candidate debates as public forums provides "no principled basis" for distinguishing between candidates and held that public broadcast stations must be free to decide whether to air debates, and which candidates to include. *Id.* Noting the ways in which public forum status would hobble journalistic judgment, the court found that "[t]he values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television." *Id.* at 490. Decisions by other circuits on the public forum doctrine also conflict with *Forbes II*.[3]

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[3] In *Muir* v. *Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023

The Eighth Circuit had previously agreed with the Eleventh Circuit's view. In *DeYoung* v. *Patten*, 898 F.2d 628 (8th Cir. 1990), the court held that a debate on Iowa Public Television was not a public forum and that a third party candidate could not raise a constitutional objection where the debate included only the two major party candidates. However, that decision subsequently was overruled by *Forbes* v. *Arkansas Educational Television Communication Network Foundation*, 22 F.3d 1423 (8th Cir.) (en banc), *cert. denied*, 115 S. Ct. 500 (1994), *and* 115 S. Ct. 1962 (1995) ("*Forbes I*"). In *Forbes II*, the Eighth Circuit held that candidate debates on state-owned television stations are limited public forums.[4] These divergent views of the public forum doctrine raise serious constitutional questions and provide a powerful reason for this Court to review the decision below.

b. Contrary to the Eighth Circuit's holding, a public television station's journalistic decision to present a debate between political candidates does not open a public forum for all candidates on the ballot to voice their opinions. The court of appeals concluded that "[t]he debate was surely a place opened by the government for a limited class of speakers,"

(1983), the full Fifth Circuit held that public television stations were not public forums and that viewers could not object to the cancellation of a scheduled program. In *Estiverne* v. *Louisiana State Bar Association*, 863 F.2d 371, 377 (5th Cir. 1989), the Fifth Circuit, following *Muir*, held that a state bar journal is not a public forum because the publication is not a passive conduit for speech, but instead requires the exercise of editorial discretion to perform its intended function. *See also Barnard* v. *Chamberlain*, 897 F.2d 1059, 1064-65 (10th Cir. 1990) (same); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967) (law review at state university), *cert. denied*, 390 U.S. 920 (1968).

4 93 F.3d 497. In the wake of *Forbes II*, yet another panel of the Eighth Circuit held in a preliminary context (without discussion) that a public station's candidate debate was a public forum, but there upheld the broadcaster's selective invitation to "newsworthy" candidates to participate in the debate. *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137 (8th Cir. 1996) (denying injunction pending appeal), discussed *infra* at 17-19. The Eighth Circuit granted initial hearing en banc in *Marcus* on December 8, 1996.

which it found included all "candidates running for the Third District Congressional seat." 93 F.3d at 504. It characterized any exclusion of a legally qualified candidate by AETC as nothing more than "ipse dixit," even as it acknowledged that such editorial decisions involve "exactly the kind of journalistic judgment routinely made by newspeople" and that "the judgment in this case was made in good faith." *Id.* at 504-505. Ultimately, the court based its conclusion that AETN is a limited public forum on its own ipse dixit -- the "crucial fact" that "the people making this judgment were not ordinary journalists: they were employees of the government." *Id.* at 505. This reasoning has no basis in this Court's jurisprudence.

1. Under this Court's precedents, AETN's public nature does not make it, or its news programs, a public forum. This Court repeatedly has held that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2446 (1995) (plurality opinion). Nothing in the First Amendment compels "'access to property simply because it is owned or controlled by the government.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (quoting *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). *See Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 301-302 (1974).

The Court recently confirmed that government ownership or control of a channel of communication is not dispositive of the public forum question. In *Lebron* v. *National Railroad Passenger Corp.*, 115 S. Ct. 961 (1995), the Court held that a government-controlled corporation is a state actor for purposes of First Amendment analysis. It compared Amtrak to the Corporation for Public Broadcasting, noting that the boards of directors of both entities are "controlled by Government appointees." *Id.* at 970. Nevertheless, control of the enterprise by "Government appointees" was not the

"crucial fact," as it was in *Forbes II*, 93 F.3d at 505, for the Court expressed no opinion as to whether a public forum had been created.[5]

2. This Court's rulings also confirm that AETN's function as a channel of communication does not make it a public forum. As with the billboard space at Pennsylvania Station, certain property controlled by the government may have *no other purpose* than the communication of ideas, *Lebron*, 69 F.3d at 653-654, but "[t]he mere physical characteristics of the property cannot dictate forum analysis." *United States* v. *Kokinda*, 497 U.S. 720, 727 (1990). If they did, as this Court has noted, "'display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.'" *Id.* at 726 (quoting *Lehman*, 418 U.S. at 304).[6]

But this is not -- and has never been -- the law. "Not every instrumentality used for communication * * * is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. Consequently, this Court has declined to accord forum status to advertising space on buses, *Lehman*, 418 U.S. at 301-302; mail boxes, *Greenburgh Civic Ass'ns*, 453 U.S. at 128-129; sidewalks adjacent to a post office, *Kokinda*, 497 U.S. at 730; charitable campaigns in federal offices, *Cornelius*, 473 U.S. at 803; and internal school mail systems, *Perry*, 460 U.S. at 49 n.9, even though all are avenues of communication controlled by the government, either by function or tradition. Most recently, this Court

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[5] 115 S. Ct. at 975. On remand, the Second Circuit held that the particular billboard at issue was a non-forum. *Lebron* v. *National R.R. Passenger Corp.*, 69 F.3d 650, *amended*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

[6] *See also Perry*, 460 U.S. at 49 n.9; *Greenburgh Civic Assn's*, 453 U.S. at 130 n.6 ("[A] bulletin board in the cafeteria at Fort Dix is specifically used for the communication of information and ideas, but such a bulletin board is no more a public forum than are the street corners and parking lots found not to be so at the same military base") (internal quotation marks omitted).

declined to hold that leased and public access channels on cable television systems are governed by the public forum doctrine. *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2385 (1996). And it is clear that public broadcasting stations, despite their communicative purpose, do not constitute designated public forums. *Muir*, 688 F.2d at 1040-41.

3. AETC's sponsorship of debates on AETN does not demonstrate any intention to open a public forum. The relevant question in a forum analysis is whether the decision by a public television station to present a debate between political candidates as part of its election year news programming constitutes opening the facility "for indiscriminate use" by political candidates. *Perry*, 460 U.S. at 47. Contrary to *Forbes II*, a sound reading of this Court's public forum cases compels the conclusion that the journalistic choices involved in sponsoring a debate do not create a forum by designation.

A "designated" or "limited" public forum is not created "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. *See also Perry*, 460 U.S. at 46-47. Such an intention cannot be inferred from the fact that the government permits some outside groups or individuals to use its channels of communication. "[S]elective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Cornelius*, 473 U.S. at 805. *See also Perry*, 460 U.S. at 47 ("[S]elective access does not transform government property into a public forum"). This Court has identified a variety of factors that illustrate the government's intention in this regard, including its practice and policy of allowing or disallowing unrestricted speech at a given location, the characteristics of the property, and, importantly, the government's stated intent. *Cornelius*, 473 U.S. at 802-803. Designation of government property as a public forum is not presumed, and the courts "will not find that a public forum has been created in the face of clear evidence of contrary intent." *Id.* at 803.

Analysis of the government's intent depends on the role it is performing in a particular case. When the State is not "'acting as lawmaker'" with the "'power to regulate or license,'" *Kokinda*, 497 U.S. at 725 (quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 896 (1961)), it is less likely to have intended to designate a public forum. Accordingly, where the government is acting in a "proprietary" rather than a "regulatory" role, courts have found that no forum has been designated. *See id.*; *Lehman*, 418 U.S. at 303-304; *Lebron*, 69 F.3d at 657. The same consideration applies in this case, where it is undisputed that AETC acted in a neutral journalistic role, rather than as a regulatory body. *See Estiverne*, 863 F.2d at 380.

With such considerations in mind, it should be clear that hosting a televised debate is not the same thing as opening a forum. The nature of the facilities at issue, station practices and policies associated with political campaign coverage, and the intention to sponsor debates as news events all underscore the fact that the requisite intention to open a public forum is absent. Broadcast stations, whether public or commercial, are not common carriers, traditionally open to all speakers.[7] Such facilities are not comparable to municipal auditoriums, which may -- or may not -- be opened as designated forums for the unfiltered speech of various speakers.[8] Rather,

[7] Section 3(h) of the Communications Act, 47 U.S.C. § 153(10), provides that broadcasters are not to be deemed common carriers, and this Court has made clear that there is no general right of access for purposes of political speech. *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 109 n.4 (1973) ("*CBS* v. *DNC*"). The same regulatory regime applies to public broadcast stations. *See FCC* v. *League of Women Voters*, 468 U.S. 364 (1984); *Chandler*, 917 F.2d at 488; *Muir*, 688 F.2d at 1040. *See also City of New York Mun. Broad. Sys.*, 56 F.C.C.2d 169 (1975).

[8] *Compare Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (auditorium was dedicated for expressive activities) *with Calash* v. *City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir. 1986) (limited past access by selected groups to a municipal auditorium does not make the facility a limited public forum).

broadcast stations are licensed by the FCC in order to exercise "'the widest journalistic freedom consistent with [their] public [duties].'"[9]

More specifically, a broadcast station's decision to sponsor a political debate stems from this journalistic function, and not from a desire to provide an "open microphone" for a hypothetical class of beneficiaries. As the Eleventh Circuit found in *Chandler*, the Georgia Public Telecommunications Commission did not intend to open a public forum for all candidates when it sponsored debates for the offices of Governor and Lieutenant Governor. Rather, the public broadcasting commission was performing its function of "'providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia.'" *Chandler*, 917 F.2d at 488 (quoting Ga. Code Ann. § 20-13-5(a)).

The conclusion that hosting a debate is not the same thing as opening a public forum for all candidates is supported by the FCC's administration of the "equal opportunities" requirement of the Communications Act, 47 U.S.C. § 315. Section 315 obliges broadcasters to make their facilities available to all "legally qualified candidates" for a given office if they have allowed one such candidate to appear. This requirement does not apply, however, if the candidate's appearance is part of a bona fide newscast, news interview, news documentary, or on-the-spot coverage of a news event. *Id.* § 315(a)(1)-(4). Two decades of precedent interpreting the Communications Act confirm that the "common denominator" of broadcasters' decisions to sponsor debates, to determine their format, and to limit participation to selected candidates is "bona fide news value." *Henry Geller*, 95 F.C.C.2d 1236, 1244 (1983), *aff'd sub nom. League of Women Voters* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1984); *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429

[9] *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS* v. *DNC*, 412 U.S. at 110). This Court has expressly distinguished the editorial function of broadcasters from the access-based regime of common carrier regulation. *See League of Women Voters*, 468 U.S. at 378.

U.S. 890 (1976). Thus, under federal law, a decision to sponsor a debate and determine its participants is an exercise of news judgment, and not an indication of a broadcaster's intention to open its facilities to all legally qualified candidates.[10] The same analysis applies here.[11]

4. The public forum theory articulated by the Eighth Circuit below destroys the ability of public broadcast stations to act as independent journalistic organizations. This Court has noted that "editing is what editors are for; and editing is selection and choice of material." *CBS* v. *DNC*, 412 U.S. at 124. Any editorial decision "to broadcast one program excludes, for that time, all other programs." *Chandler*, 917 F.2d at 488. The editorial selection of who shall appear on particular programs is a journalistic choice of equal significance. Accordingly, this Court has noted that a right of access for political speakers would represent an "erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals, who are not." *CBS* v. *DNC*, 412 U.S. at 124.

It is important to recognize in this regard that the public forum principles articulated in *Forbes II* are not limited to

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[10] Most recently, the FCC granted exemptions from "equal opportunities" requirements to various broadcasting organizations, including PBS, to enable these entities selectively to provide time blocks to political candidates during the 1996 campaign. The PBS proposal enabled the "major part[y]" presidential candidates (selected by such criteria as polling results) to make unmoderated statements to the public on successive days during prime time hours. The Commission found that such presentations did not trigger equal opportunities requirements, which would have obliged PBS to open its facilities to all "legally qualified candidates," because the presentations were "bona fide news events" governed by "the good faith news judgment of PBS." *In re Requests of Fox Broad. Co., Pub. Broad. Serv., & Capital Cities/ABC, Inc.*, 11 FCC Rcd. 11,101, 11,102-03 (1996).

[11] It is undisputed that AETC intended its debates to be bona fide news programs within the meaning of Section 315(a).

publicly controlled broadcasting stations. The Eighth Circuit's holding creates a constitutional right of access to any state-owned or controlled publisher that allows citizens to communicate their views to the public. As the circuit court pointed out, it was immaterial that editorial selections were routine journalistic judgments made in good faith; the "crucial fact" was that the editors were state employees. *Forbes II*, 93 F.3d at 504-505. This holding, however, fails to grasp that sound editorial practices cannot coexist with a rule of law that imposes a constitutional right of access on behalf of all speakers in a particular class.

For this reason, other courts have routinely rejected claims that speakers have a First Amendment right to place articles or advertisements in state-run publications. *Barnard*, 897 F.2d 1059 (state bar newsletter); *Estiverne*, 863 F.2d 371 (same); *Sinn* v. *The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987) (advertisement in university newspaper); *Avins*, 385 F.2d 151 (law review at state university); *Leeds* v. *Meltz*, 898 F. Supp. 146 (E.D.N.Y. 1995), *aff'd*, 85 F.3d 51 (2d Cir. 1996) (advertisement in school newspaper); *Allston* v. *Lewis*, 480 F. Supp. 328 (D.S.C. 1979), *aff'd*, 688 F.2d 829 (4th Cir. 1982) (bar association newspaper). The principle at issue was amply set out by the Fifth Circuit in *Estiverne:*

> [T]he Louisiana State Bar Journal, as the trade publication of the Louisiana Bar, * * * serves a narrow, instrumental role. It was not established as an open forum for the expressive activities of the public, or of all members of the Bar. Rather, the invitation is to *submit* articles and advertisements for consideration by the editorial board, within the framework of editorial discretion necessary to fulfill the magazine's purposes. [863 F.2d at 381 (emphasis in the original).]

The court compared the bar journal to the public broadcast stations in *Muir* and concluded that the purpose of the publication "could not be accomplished without the exercise of editorial discretion." *Id.* at 380 n.12. If it is not reviewed by this Court, *Forbes II* will severely limit the exercise of

journalistic judgment by public stations, thus relegating them to second class status under the First Amendment compared to their private counterparts.

II. THE EIGHTH CIRCUIT'S RULING WILL RESTRICT THE ABILITY OF PUBLIC TELEVISION STATIONS TO PROVIDE CAMPAIGN COVERAGE, THUS UNDERMINING THE CORE PURPOSE OF THE FIRST AMENDMENT

Consistent with their public service mission and journalistic responsibilities, public television and radio stations frequently sponsor and broadcast debates between candidates for local, state, and national office. For purposes of this brief, amici surveyed member stations and determined that public broadcasters sponsored and telecast well over three hundred debates in 1996. If, as the court below ruled, public broadcast stations always must invite all qualified candidates without regard to sound editorial judgment, there will be a flood of candidates, each claiming a constitutional right of access. This glut of candidates often will make such programs impractical to produce and inevitably will cause public stations to curtail debates. Thus, the Eighth Circuit's expansion of the public forum doctrine ironically will produce less speech and less public debate on campaign issues -- precisely the opposite of the effect intended by that court. It also is a result contrary to the central purpose of the First Amendment.

This problem is far from speculative. Candidates for offices at all levels abound, and it is a simple matter to attain ballot status in many states.[12] In Tennessee, a candidate need

[12] Thus, a candidate often may attain ballot status with a relatively small number of petition signatures by registered voters. For typical examples, see Idaho Code § 34-626(a), (b) (500 House, 1,000 Senate); Iowa Code Ann. § 45.1(1), (2) (300 House, 1,500 Senate); Ky. Rev. St. Ann. § 118.315(2) (400 House, 5,000 Senate); Miss. Code Ann. § 23-15-359(1)(a), (c) (200 House, 1,000 Senate); N.D. Cent. Code § 16.1-12-02(a), (b) (300 House, 1,000 Senate); N.J. Stat. Ann. § 19:13-5 (100 House, 800 Senate); R.I. Gen. Laws § 17-14-7(a), (b) (500 House, 1,000 Senate); Utah Code Ann. § 20A-9-502 (2)(a)(i), (ii) (100 House, 300 Senate).

obtain only *25 signatures* to appear on the ballot as a candidate for the U.S. House or Senate, Tenn. Code Ann. § 2-5-101(b)(1), and in Oklahoma, a candidate need not obtain any signatures at all, but may appear on the ballot after payment of a modest fee.[13] Not surprisingly, in 1996 eleven candidates for the U.S. House of Representatives appeared on the ballot in one Tennessee district (as well as in a Texas district).[14] Additionally, the Federal Election Commission has reported that 23 presidential candidates appeared on state ballots in the 1992 election cycle, and 21 candidates appeared on ballots in 1996.[15]

Congress determined long ago that an absolute statutory right of candidate access to news programs under the Communications Act "'would tend to dry up meaningful radio and television coverage of political campaigns.'" *Chisholm*, 538 F.2d at 352 (quoting S. Rep. No. 86-562 at 10 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2564, 2572). Congress amended Section 315 of the Act to exempt bona fide news

[13] In Oklahoma, a candidate may appear on the ballot simply by making payments, respectively, of $750 (House) or $1,000 (Senate). Okla. Stat. Ann. tit. 26, § 5-112.

[14] *See 1996 Election Results*, 54 Congressional Quarterly Weekly Report 3250, 3256-57 (1996). Indeed, ballots containing between 6 and 11 names in congressional and gubernatorial races were not uncommon. For example, in addition to the Tennessee and Texas races described in the text, 9 individuals qualified for the ballot in the New Jersey Senate race; 7 for the Tennessee Senate race and the Vermont gubernatorial race; and 6 for senatorial and congressional races in California, Illinois, Iowa, Massachusetts, Michigan, Mississippi, New Jersey, Oregon, and Tennessee. *Id.* at 3250-57.

[15] *See In re Requests of Fox*, 11 FCC Rcd. at 11,105 n.10; Federal Election Commission, *1996 Presidential Candidates on the General Election Ballots of Each State and the District of Columbia* (Oct. 18, 1996) <http://www.fec.gov/96fsd/pballots.htm>. *See generally* Peter Maass, *What Makes John Doe Run?*, Wash. Post, Oct. 19, 1996, at D1.

coverage after finding that enforcement of a "rigid" access requirement would deter broadcasters from covering political campaigns, for to do so would "'assume the burden of presenting a parade of aspirants.'" *Id.* at 352 n.5 (quoting S. Rep. No. 86-562 at 9, 1959 U.S.C.C.A.N. at 2571). As the expert agency entrusted with interpreting the Section 315 amendments, the FCC repeatedly has expanded the news exemption to enable broadcasters to host debates and expand political coverage. [16] These decisions were premised on the assumption that a rigid right of access for all candidates would limit the number of debates. The same considerations apply to candidates' assertions that the First Amendment provides a right of access to broadcast stations. *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 430-432 (D.C. Cir. 1980).

Any contrary holding subverts the First Amendment. Last August, for example, just after the *Forbes II* decision, the Nebraska Educational Telecommunications Network canceled a scheduled debate between the major party contenders for the United States Senate due to access demands by less newsworthy candidates. [17] The same phenomenon will no doubt occur on a far broader scale if the Eighth Circuit's anomalous decision evades this Court's review.

III. THIS COURT SHOULD CLARIFY THAT PUBLIC BROADCAST STATIONS MAY MAKE REASONABLE JOURNALISTIC CHOICES IN PRESENTING CANDIDATE DEBATES EVEN IF DEBATES ARE CONSIDERED LIMITED PUBLIC FORUMS

Even if this Court agrees with the Eighth Circuit that AETN's congressional debate is a limited public forum, it

16 *See Aspen Inst.*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm*, 538 F.2d 349; *Henry Geller*, 95 F.C.C.2d 1236.

17 *See* Don Walton, *Senate Debate at Fair Canceled*, Lincoln Journal Star, Aug. 24, 1996 at 1A; *Name on Ballot Not Enough to Qualify For Political Debate* (editorial), Lincoln Journal Star, Aug. 27, 1996, at 4B.

should clarify that AETC's editorial decision to invite only newsworthy candidates as measured by their viability was a permissible journalistic judgment. The subsequent *Marcus* decision by a panel of the Eighth Circuit illustrates this point. There, the court found that public broadcasters may limit debate invitations to certain candidates because "newsworthiness is peculiarly a decision within the domain of journalists," and that Iowa Public Television had "a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates." *Marcus*, 97 F.3d at 1142, 1144. The same findings apply fully to AETC.

In establishing its congressional debate, AETC was serving precisely the same "compelling interest" as was found in *Marcus*. Like the Iowa public stations, AETC operates as "a government agency which is also a media organ." *Id.* at 1142. Both state entities are journalistic enterprises that, "[b]y [their] nature and under controlling policies * * * *must* be concerned with the newsworthiness of the issues and speakers included in [their] programming." *Id.* (emphasis in original). Both are governed by the Statement of Principles of Editorial Integrity in Public Broadcasting, and both established programming policy statements under which editorial judgments were made regarding news and campaign coverage. *Id.* at 1142-43; Pet. App. 64a, 82a, 96a; Tr. Trans. 186-197.

Although the application of these journalistic principles was characterized in *Forbes II* as relating only to the "viability" of candidates, the discussion in *Marcus* made clear that the identical factors determined a candidate's "newsworthiness." *Compare Marcus*, 97 F.3d at 1143-44 (describing factors in news judgment, such as whether candidate had shown "success at the polls," was attracting crowds and news coverage, was successfully raising funds, was attracting campaign volunteers, etc.) *with Forbes II*, Tr. Trans. at 147-155, 172-173 (AETC's news judgment turned on Forbes' inability to generate public support or media coverage, his lack of campaign staff, headquarters, or contributions, and his inability to draw crowds). *See also Marcus*, 97 F.3d at 1144

(Beam, J., dissenting) (describing *Forbes II* and *Marcus* as "two peas from the same analytical pod" and characterizing the respective editorial decisions as "indistinguishable").[18]

The Eleventh Circuit in *Chandler* stressed that such journalistic judgments provide the only sound basis for deciding which candidates should appear on public stations' televised debates. The court noted:

> A decision to air the debate between the two front runners, or the three who will appear on the ballot, or others, is appropriately made by the programmers undertaking to provide an educational program of sufficient interest to attract viewers. [917 F.2d at 489.]

The *Chandler* court foretold that a ruling requiring candidates' access on public stations would have "no principled basis" for distinguishing between candidates in the selected class. *Id.*

The *Forbes II* decision vividly demonstrates the lack of intelligible standards predicted in *Chandler*, especially when considered in light of the subsequent *Marcus* ruling. The *Forbes II* court initially defined the class of speakers qualifying for a right of access as including "legally qualified candidates." 93 F.3d at 504. *See also id.* ("gather[ing] enough signatures to appear on the ballot" gives any candidate "equal status with the Republican nominee and the Democratic nominee"). It further noted the political success of write-in candidates and stated that whether a candidate is viable "ultimately [is] a judgment to be made by the people of the Third Congressional District." *Id.* at 504-505. Nevertheless, evidently to prove its point that "[p]olitical viability is a tricky concept," *id.* at 505, the court subsequently modified its holding to exclude certain debates

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[18] Once again, the FCC has based its finding of bona fide news judgment on the same factors. *See, e.g., In re Requests of Fox*, 11 FCC Rcd. at 11,102-03. *See also id.* at 11,105 (noting that 20 presidential candidates cumulatively received less than one percent of the popular vote in 1992).

("organized by people or groups other than the defendants") and specified candidates ("write-in candidates"). *See Forbes v. AETN*, No. 95-2722 WAFS (Sept. 26, 1996) (denying motion to stay mandate).

The journalistic judgments relied upon in both *Chandler* and *Marcus* provide a far more solid basis for deciding which candidates should be included in candidate debates on public television stations than does the holding in *Forbes II* that sweeps in some poorly defined subset of legally qualified candidates. Review by this Court is all the more pressing here, in the wake of *Marcus*, since the difference between a compulsory right of access for some candidates and exclusion can turn on how public broadcasters (or a reviewing court) *characterize* their sound journalistic decisions.

This issue must be clarified before it leads to a litigation boomlet in which courts are called upon to dissect the particular wording of editorial decisions that, in substance, are identical. As the *Marcus* court observed, "professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges." 97 F.3d at 1144.

Unless *Forbes II* is corrected, the inevitable consequence will be to place such decisions in the hands of judges and to disrupt and curtail the presentation of televised debates. It is important to recall that, in *Chandler*, the district court initially issued a temporary restraining order blocking a televised debate between the Democratic and Republican candidates for Governor because it did not include a third party challenger. Fortunately, the lower court decision to treat public television stations as public forums was reversed by the Eleventh Circuit and the TRO vacated. *Chandler*, 917 F.2d at 490. Such disruptions of the democratic process will become commonplace unless this Court resolves the confusion created by *Forbes II*.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, amici respectfully urge this Court to grant the Petition for a Writ of Certiorari.

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ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 96-779

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Relevant Docket Entries in the U.S. District Court Western District of Arkansas (Fort Smith)

Date	Filings
10/19/92 1	COMPLAINT, w/jury demand (11 Summons(es) issued & retd to pro se litigant f/svc) (msj) [Entry date 10/20/92]
10/19/92 2	MOTION by plaintiff Ralph P Forbes for immediate emergency hearing (msj) [Entry date 10/20/92]
10/19/92 5	MOTION by plaintiff Ralph P Forbes for declaratory judgment (msj) [Entry date 10/20/92] [Edit date 12/18/92]

10/20/92 7	ORDER by Honorable H. F. Waters denying motion for temporary restraining order/preliminary injunction [3-1] [2-1]. (cc: Forbes, HFW) (msj)
10/21/92 8	NOTICE OF APPEAL by plaintiff Ralph P Forbes from District Court decision re: order [7-1] dated 10/20/92 (msj)
10/22/92 9	TRANSMITTAL LETTER to USCA, 8th Circuit (msj)
10/26/92 10	ORDER (copy) by 8th Circuit Chief Judge Richard S. Arnold denying appellant's motion f/injunctive relief pending appeal (cc: all counsel by 8th Cir) (msj)
10/26/92 11	ORDER (USCA, 8th Circuit) affirming the decision of the District Court [8-1] (cc: all counsel) (msj)
11/2/92 12	AMENDED COMPLAINT [1-1] by plaintiff Ralph P Forbes; jury demand; adding KHBS TV/Channel 40, KHOG TV/Channel 29, ABC (msj)
11/10/92 13	MOTION by defendants Susan J Howarth, Victor Fleming, GE Campbell, Caroline Whitson, Diane Blair, S McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L Oliver, and Bill Clinton to dismiss complaint, demand for declaratory judgment, and emergency temporary restraining order (th)

11/10/92 14	MEMORANDUM BRIEF by defendants Susan J Howarth, Victor Fleming, GE Campbell, Caroline Whitson, Diane Blair, S McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L Oliver, and Bill Clinton in support of motion to dismiss complaint, demand for declaratory judgment, & emergency temporary restraining order [13-1] (th)
12/4/92 17	RESPONSE by plaintiff Ralph P Forbes to defendants KHBS, KHOG, and ABC's motion to dismiss case [15-1], and to defendants Susan Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton's motion to dismiss [13-1] (th)
12/17/92 18	LETTER by Honorable H.F. Waters dd 12/16/92, re: defts' motions to dism (rw)
12/17/92 19	ORDER by Honorable H.F. Waters granting defts' motion to dismiss case [15-1], granting motion to dismiss [13-1] dismissing case w/prej (cc: all counsel) (rw)
12/29/92 20	NOTICE OF APPEAL by plaintiff Ralph P Forbes from District Court decision, re: order [19-2] dated 12/17/92 (cc: opposing counsel) (msj)
12/29/92 22	TRANSMITTAL LETTER to USCA, 8th Circuit (msj)

1/8/93 23	SCHEDULING ORDER from USCA; Appellate Docket Number 93-1031WAFS (msj)
2/1/93 26	TRANSMITTAL LETTER to USCA, St. Louis, MO (msj)
2/1/93 27	ORDER (USCA, 8th Circuit) on petn f/rehearing on 1st appeal; dismissing appeal as moot; remanding to district court w/instructions to vacate its order denying preliminary inj relief on merits & to enter a new order denying motion f/preliminary inj as moot (cc: all counsel) (msj)
7/1/94 28	OPINION of USCA, 8th Circuit re appeal [20-1] (jrs)
7/1/94 29	JUDGMENT (USCA, 8th Circuit) affirming in part, and reversing and remanding in part the Decision of the District Court [Appeal [20-1] (cc: all counsel); appeal record return ddl set for 7/15/94 (jrs)
7/8/94 --	ORIGINAL FILE returned from U.S. Court of Appeals (msj)
7/12/94 30	ANSWER by defendant Bill Clinton, defendant Amy L Oliver, defendant Lillian Springer, defendant Jerry McIntosh, defendant James Ross, defendant S McAdams, defendant Diane Blair, defendant Caroline Whitson, defendant GE Campbell, defendant Victor Fleming, defendant Susan J Howarth, defendant AR Ed

	Telecommun, defendant AR Ed Television Com to complaint & and complaint [12-1], [1-1] (msj)
5/5/95 --	VOLUME II BEGINS (th)
5/5/95 46	MOTION by defendants Bill Clinton, Amy L Oliver, Lillian Springer, Jerry McIntosh, James Ross, S McAdams, Diane Blair, Caroline Whitson, GE Campbell, Victor Fleming, Susan J Howarth, AR Ed Telecommun, AR Ed Television Com to amend the case caption (th)
5/5/95 47	MOTION by dfts Bill Clinton, Amy L Oliver, Lillian Springer, Jerry McIntosh, James Ross, S McAdams, Diane Blair, Caroline Whitson, GE Campbell, Victor Fleming, Susan J Howarth, AR Ed Telecommun, AR Ed Television Com to dismiss G.E. Campbell and S. McAdams as dfts (th)
5/5/95 48	MEMORANDUM BRIEF by dfts Bill Clinton, Amy L Oliver, Lillian Springer, Jerry McIntosh, James Ross, S McAdams, Diane Blair, Caroline Whitson, GE Campbell, Victor Fleming, J Howarth, AR Ed Telecommun, AR Ed Television Com in support of motion to dismiss G.E. Campbell and S. McAdams as dfts [47-1] (th)
5/19/95 --	VOLUME III BEGINS (th)

5/19/95 60	RESPONSE by plaintiff Ralph P Forbes to motion to amend the case caption [46-1], w/attachments (rw)
5/23/95 65	ORDER by Honorable H.F. Waters granting motion to dismiss G.E. Campbell and S. McAdams as dfts [47-1] party GE Campbell, party S McAdams granting motion to amend the case caption [46-1] dismissing party John Does denying petitions to join as pltfs & members of an injured class (cc: all counsel) (rw)
5/23/95 --	Docket Modification (Utility Event) per Order this date, granting motion to dismiss Steve Barnes & Gene Goss as parties subject to requests for admission by pltf [56-1] substituting Lavenia Craig, Robert Doubleday as Commissioner,, terminating Larry Foley, Carol Adornetto, Bill Simmons, Oscar Eugene Goss, Steve Barnes, John Does, ABC, KHOG TV/Channel 29, KHBS TV/Channel 40 as captioned dfts (msj)
5/25/95 68	RESPONSE by defendant Bill Clinton, defendant Amy L Oliver, defendant Lillian Springer, defendant Jerry McIntosh, defendant James Ross, defendant Diane Blair, defendant Caroline Whitson, defendant Victor Fleming, defendant Susan J Howarth, defendant AR Ed Telecommun, defendant AR Ed Television Com to motion to amend the case caption [46-1] (rw)

6/5/95 --	COURT RECORDING; dt of proceedings 6/5/95; Location of tapes - Fayetteville (ct) [Entry date 06/07/95]
6/5/95 96	CLERK'S NOTES: TRIAL TO JURY (HFW) (day 2) (ct) [Entry date 06/07/95]
6/6/95 95	CLERK'S NOTES: TRIAL TO JURY (HFW) (day 1) Jury trial begins (ct) [Entry date 06/07/95]
6/6/95 --	COURT RECORDING; Location of tapes - Fayetteville (ct) [Entry date 06/07/95]
6/7/95 94	MOTION by dft to revise jury instructions and interrogatory (th)
6/7/95 97	CLERK'S NOTES: TRIAL TO JURY (HFW) (day 3) Jury returns verdict. (ct)
6/7/95 98	VERDICT against plaintiff Ralph P. Forbes (ct)
6/7/95 --	COURT RECORDING; dt of proceedings 6/7/95; Location of tapes Fayetteville (ct)
6/9/95 99	JUDGMENT: by Honorable H.F. Waters pursuant to jury verdict [98-1]; dismissing case with prejudice (cc: all counsel) (th)
6/19/95 100	NOTICE OF APPEAL by plaintiff Ralph P Forbes from District Court judgment [99-2] dated 6/9/95 (cc:

opposing counsel, ECRO) (msj) [Entry date 06/20/95]

6/20/95 102 TRANSMITTAL LETTER to USCA, 8th Circuit (msj)

Relevant Docket Entries in United States Court of Appeals for the Eighth Circuit

7/7/95 Civil Case Docketed. (dlb)

7/7/95 CERTIFIED copies notice of appeal, docket entries, and orders dated 6/9/95 and 6/29/95. [95-2722] [592220] (dlb)

7/7/95 RECORDS received: Original File, consisting of 4 Volume(s), Location St. Louis. [95-2722] (dlb)

8/4/95 MOTION of aplees, AR Educational, AR Educational, Susan J. Howarth, Victor Fleming, Dr. Caroline Whitson, Diane Blair, James Ross, Jerry McIntosh, Lillian Springer, Bill Clinton, for Hearing En Banc. [95-2722] [602807] w/service 8/2/95 (jpp)

8/9/95 ORDER filed: Appellees the Arkansas Educational Television Commission, the Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Amy Oliver, Victor Fleming, Dr. Caroline Whitson, Diane Blair, James Ross, Jerry McIntosh, Lillian Springer, Lavenia Craig, Robert Doubleday, and William Clinton's motion for initial hearing en banc is hereby ordered taken with the

case for consideration by the panel to which this case is submitted for disposition on the merits. [603943] (jpp)

9/1/95 APPEARANCE for appellant, attorney Charles Suphan, J. Fred Hart [95-2722] [614846] (dlb)

9/8/95 CASE is no longer pro se. [95-2722] (jpp)

11/21/95 BRIEF FILED - Brief of Appellees - AR Educational, et al. 50 pages -- 10 copies - with service 11/20/95. [95-2722] [642358] (jpp)

11/21/95 RECORDS received: Appendix filed by Appellees AR Educational consisting of 1 Volume(s), 3 Copies. [95-2722] (jpp)

11/21/95 MOTION of amicus curiae, Organization of State Broadcasting Executives (OSBE) for leave to file amicus curiae brief on behalf of Appellees. [642736] w/service 11/20/95 (skh)

11/21/95 BRIEF TENDERED - Brief of Amicus-Curiae - on behalf of Organization of State Broadcasting Executives - 13 pages - 10 copies w/service 11/20/95. (skh)

11/22/95 ORDER filed: Motion of Organization of State Broadcasting Executives for leave to participate as amicus curiae in support of the appellees has been filed. Parties are notified that absent the filing

	of a formal objection 10 days, the motion will be deemed as granted. [95-2722] [642739] (skh)
12/5/95	BRIEF FILED - Brief of Amicus-Curiae - on behalf of Appellant. Organization of State Broadcasting Executives 3 pgs - 10 copies w/service 11/20/95. [95-2722] [647718] (jpp)
12/5/95	Clerk letter sent granting motion for leave to appear as amicus and filed brief [95-2722] (jpp)
12/6/95	JUDGE ORDER: The appellees' initial petition for hearing en banc is denied. Judge McMillian would grant the petition. [602807-1] filed by AR Educational, AR Educational, Susan J. Howarth, Victor Fleming, Dr. Caroline Whitson, Diane Blair, James Ross, Jerry McIntosh, Lillian Springer, Bill Clinton. [95-2722] [648264] (jpp)
12/6/95	BRIEF FILED - Reply brief - Ralph P. Forbes. 11 pgs - 10 copies - w/service 12/4/95. [95-2722] [648353] (jpp)
12/28/95	Brief Correction(s) received from Appellant Ralph P. Forbes. Correction(s): separately bound appendix. [95-2722] (jpp)
12/28/95	RECORDS received: Appendix filed by Appellant Ralph P. Forbes consisting of 1 Volume(s), 3 Copies. [95-2722] (jpp)

2/29/96	*SET FOR ARGUMENT* - April 1996 in St. Louis. [95-2722] (dgh)
4/11/96	ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Richard S. Arnold, Chief Judge, Theodore McMillian, Circuit Judge, John R. Gibson, Circuit Judge. J. Fred Hart for Appellant Ralph P. Forbes. Richard D. Marks for Appellees Robert Doubleday, Appellees Lavenia Craig, Appellees Larry Foley, Appellees Carol Adornetto, Appellees Oscar Eugene Goss, Appellees Steve Barnes, Appellees ABC, Appellees KHOG/TV Channel 29, Appellees KHBS TV/Channel 40, Appellees John Does, Appellees Bill Clinton, Appellees Amy L. Oliver, Appellees Lillian Springer, Appellees Jerry McIntosh, Appellees James Ross, Appellees S. McAdams, Appellees Diane Blair, Appellees Dr. Caroline Whitson, Appellees G.E. Campbell, Appellees Victor Fleming, Appellees Susan J. Howarth, Appellees AR Educational, Appellees AR Educational. Rebuttal by : Mr. Hart. Recorded. [95-2722] (rmh)
8/21/96	THE COURT: Richard S. Arnold, Theodore McMillian, John R. Gibson. OPINION FILED by Richard S. Arnold PUBLISHED. [95-2722] [747652] (dms)
8/21/96	JUDGMENT: Richard S. Arnold, Theodore McMillian, John R. Gibson: The judgment of the lower court is

	REVERSED and REMANDED in accordance with the opinion. [95-2722] [747655] (dms)
9/3/96	MOTION of aplee AR Educational Television, to stay mandate pending filing of certiorari. [95-2722] [751630], TO COURT. w/service 8/30/96 (ema)
9/11/96	Supplement to Motion for stay of mandate from Richard D. Marks for Appellees Robert Doubleday, Appellees Lavenia Craig, Appellees Larry Foley, Appellees Carol Adornetto, Appellees Oscar Eugene Goss, Appellees Steve Barnes, Appellees ABC, Appellees KHOG/TV Channel 29, Appellees KHBS TV/Channel 40, Appellees John Does, Appellees Bill Clinton, Appellees Amy L. Oliver, Appellees Lillian Springer, Appellees Jerry McIntosh, Appellees James Ross, Appellees S. McAdams, Appellees Diane Blair, Appellees Dr. Caroline Whitson, Appellees G.E. Campbell, Appellees Victor Fleming, Appellees Susan J. Howarth, Appellees AR Educational, Appellees AR Educational. TO COURT. [95-2722] (ema)
9/26/96	JUDGE ORDER: denying appellee motion to stay mandate filed by AR Educational Television Commission. A couple of observations may be helpful. First, the defendants are free, to the extent provided by law, to cover bona fide news events, including candidate debates organized by people or groups

	other than the defendants. Second, no question with respect to write-in candidates was presented or decided in this case. [751630-1] [95-2722] [761290] (mls)
9/26/96	MANDATE ISSUED [95-2722] (mls)
9/27/96	RESPONSE of aplnt, Ralph P. Forbes, in opposition to appellee motion to stay mandate filed by AR Educational (with supporting memorandum). See order of 9/26/96. No action taken regarding response. [751630-1] [95-2722] [763544]. (ema)
10/3/96	RECEIPT for Mandate. [95-2722] [766108] (dms)
10/17/96	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: 4 Vol. OF; 3 Vol. TR; 2 Envelopes Exh. [95-2722] (mls)
11/29/96	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 11/19/96. Supreme Ct. Case No.: 96-779 [95-2722] [785481] (dms)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and the People	*	
	*	
-VS-	*	EMERGENCY
	*	
The Arrogant Orwellian	*	CIVIL RIGHTS
Bureaucrats of the Arkansas	*	
Educational Television	*	CLASS ACTION
Commission Network	*	
Foundation and Its Board of	*	CIVIL ACTION
Directors in Their Official	*	
Capacities;	*	
	*	
The Arkansas Educational	*	
Telecommunications and Its	*	
Members and Officers;	*	
	*	
Susan J. Howarth, in her	*	
official capacity as Executive	*	
Director;	*	
	*	
Victor Fleming, in his official	*	
capacity as Chairman;	*	
	*	
G.E. Campbell, in his official	*	
capacity as Vice Chairman;	*	
	*	

Dr. Caroline Whitson, in her	*
official capacity as Secretary;	*
	*
Commissioner Diane Blair,	*
in her official capacity;	*
	*
Commissioner S. McAdams, in	*
his official capacity;	*
	*
Commissioner James Ross, in	*
his official capacity;	*
	*
Commissioner Jerry McIntosh,	*
in his official capacity;	*
	*
Commissioner Lillian Springer,	*
in her official capacity;	*
	*
Amy L. Oliver, in her	*
official capacity as Production	*
Manager	*
	*
William Clinton, in his official	*
capacity as Governor of the State	*
of Arkansas;	*
	*
and certain "John Doe" Crooked,	*
Lying Politicians and Political	*
"Dirty Tricks" Operatives;	*
	*
The Special Interests That	*
Control the Politicians and	*
Exert Illegal Influence on	*
AETN;	*
	*

Defendants

Filed: October 19, 1991

COMPLAINT FOR CONSPIRACY AGAINST THE PEOPLE TO DENY THEM OF THEIR RIGHT TO KNOW AND TO ROB THEM OF THEIR BIRTHRIGHT TO ELECT REPRESENTATIVES OF THEIR OWN CHOICE

WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF by SEPARATE and INCORPORATED TRO and DECLARATORY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and the People	*	
	*	EMERGENCY
-VS-	*	CIVIL RIGHTS
	*	CLASS ACTION
The Crooked Lying Politicians;	*	CIVIL ACTION
	*	NO. 92-
The Orwellian Bureaucrats of AETN;	*	
	*	
The Special Interests:	*	
	*	
Certain Media "Personalities" Who Have Sold Out the People and Betrayed the Ethics and Principles of Professional Journalism;	*	
	*	
and Governor Clinton of the State of Arkansas;	*	
Defendants	*	

COMPLAINT AGAINST BUREAUCRATS AND POLITICIANS WHO CONSPIRE TO DEPRIVE THE PEOPLE OF THEIR RIGHTS AND LIBERTIES

WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER and DECLARATION OF RIGHTS PRIOR TO OCTOBER 22nd, 1922

COMES NOW, RALPH P. FORBES, Plaintiff Pro Se on behalf of himself, and The People of Arkansas and the Voters of the 3rd district, and states the following:

THE DEFENDANTS HAVE CONSPIRED, jointly and severally, to Violate the Constitutions and laws of the United States and OF the State of Arkansas, respectively, and to transgress the rights of the people and destroy their right to free and independent self-government by denying the people their most fundamental rights to be informed and to vote effectively for their own enlightened self interests;

The defendants have conspired under color of law to deprive the people of their rights in numerous ways in a continuing defiance of the People, Law, Justice and Rights.

Defendant AETN is currently staging a so-called congressional "debate" that they plan to broadcast on October 22nd at 7:00 p.m., in which they are unconstitutionally and unlawfully excluding Independent Candidate Ralph P. Forbes that requires an immediate Declaration of Rights and Temporary Restraining Order to protect the people's rights, the integrity of the election and the rights of Candidate Forbes from irreparable harm as more fully shown in the separate motions and briefs.

THE PLAINTIFFS

WE, THE PEOPLE, are that class of Persons, who are endowed by our Creator with certain inalienable and indefeasible Rights, in whom reside ultimate political power and sovereignty under God.

Defendants are unlawfully discriminating against that class of Citizens who petitioned to have the name of Forbes placed on the ballot as the people's Independent Candidate to represent the 3rd district in the United States Congress, and by denying equal rights to broadcasting opportunities on AETN, a television network owned by the People of Arkansas, they are trespassing against the rights of all Arkansans.

The election is approximately two weeks from the filing of this case. Plaintiff Forbes is campaigning night and day. But the blatant transgression against the people and Forbes by AETN has left Plaintiff Forbes no option but to turn to this court to protect his rights, the rights of the voters and the integrity of the electoral process.

BRIEF STATEMENT OF THE CASE

This case arises because of a systematic and general conspiracy by the Defendants, under color of law, to deny the Plaintiffs and all American Citizens their basic Constitutional Rights by unlawfully changing this constitutional Republic of Law into a soviet-like dictatorship in which party bosses, bureaucrats, and powerful special interests shall alone have the power to decide who may or may not run for elective office; and to deny the American People their fundamental Rights protected by the First Amendment by censoring ideas and opinions that do not conform their own plans for post-American "new world order."

The Defendants have continuously conspired to deprive the American People in general, the Voters of Arkansas and the third district, in particular, and the Plaintiff-in-chief, Independent Candidate Ralph Forbes of their most basic political Rights secured by the First Amendment to the United States, as more fully shown in this Complaint.

BRIEF STATEMENT OF THE FACTS

1. The people and Ralph Forbes have had their rights flagrantly and blatantly violated in a continuing pattern of abuse under color of law for many years.

2. In 1990 Forbes won 53% of the statewide vote in a 3-way race, carrying 72 of Arkansas' 75 counties and all 16 counties of the 3rd district by absolute majorities.

3. Certain of the defendants conspired against the people by wholesale bartering of bloc votes in Pulaski County and elsewhere to prevent the maverick populist Tommy Robinson off of the gubernatorial ballot. This same vote tampering forced Forbes into an unnecessary runoff election.

4. The runoff election was an avalanche of dirty tricks and violations of law, including certain of the defendants paying certain operatives thousands of dollars to wage a war of dirty tricks, lies, physical attacks against Forbes and to violate his rights and the rights of the voters by any means to prevent Forbes' election.

UNLAWFUL SELECTIVE AND DISCRIMINATORY CLOSING DOWN OF PRO-FORBES POLLING PLACES

5. When it appeared that all their attacks were backfiring and Forbes would be elected certain of the defendants systematically and selectively closed down more than 75% of the polling places, required by law to be open, in the 72 counties carried by Forbes.

Violation of Equal Protection Clause of Fourteenth Amendment

6. These Defendants denied Plaintiffs and their class, the grass-roots Arkansas Voters equal access to the ballot box and right of franchise in order to impair and Plaintiffs' rights of expression and association because of Plaintiffs status as probable Voters for Forbes.

7. Defendants, acting under color of state law for all times relevant to this lawsuit, knowingly and willfully discriminated against Plaintiffs by not allowing them equal access to polling places.

8. Denying persons equal access to use public facilities due to their political beliefs or activities impairs these persons' rights of political expression and association and violates the equal protection clause of Fourteenth Amendment.

9. In 1986 Forbes won 63% of the vote in a statewide primary. Certain Defendants publicly boasted it didn't matter how the people voted, they would stop Forbes from winning.

10. Plaintiff Forbes apologizes to the court for the hasty manner in which this complaint had to be prepared, and he begs leave to amend this pleading by being more particular in the multitude of invasions of rights by the defendants and the continuing violations of 42 U.S.C. 1981, et seq.

11. Plaintiffs have been damaged as a result of said discrimination and will be irreparably damaged if such unlawful behavior is allowed to continue and are entitled to an injunction prohibiting further unlawful actions and are entitled to damages, costs, and attorney's fees.

12. Defendants acting under color of state law for all times relevant to this lawsuit, subjected Plaintiffs to deprivation of rights secured by the United States Constitution.

13. Defendants knowingly and willfully damaged Plaintiffs by impairing their constitutional rights by in effect banning Plaintiffs from exercising rights to political expression in a public fora all over the State.

14. Defendants knowingly and willfully denied Plaintiffs' equal rights to expression and association in order to damage Forbes because of their status as likely to vote for Forbes.

15. Plaintiffs have been damaged by Defendants' actions and are entitled to an injunction prohibiting further unlawful actions and are entitled to damages, costs, and attorneys fees.

RELIEF DEMANDED

WHEREFORE, This Court should declare that each and every Voter in Arkansas who has been denied their right to vote, or to cast an informed, effective ballot by the unlawful actions of the defendants is entitled to statutory judgment of $10,000.00 each for each act of impairment, deprivation or denial of their right to vote pursuant to 42 USC 1981, et seq.

And, such other remedial, punitive, and exemplary damages as a jury shall find just and proper.

Respectfully submitted,

/s/ Ralph P. Forbes

Ralph P. Forbes
in propia persona,

Box 88, London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

/s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 19 Day of Oct., 1991.

My Commission expires June 30, 1996.

/s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, /s/ Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 19th Day of October, 1992, by hand or by U.S. mails as appropriate:

Ms. Susan Howarth, Executive Director
AETN
350 S. Donaghey
Conway, AR 72032
501/682-4118 or 501/450-1727

Attorney General Winston Bryant
200 Tower Building
323 Center St.
Little Rock, AR 72201
501/682-2007

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and The People	*	
	*	
-VS-	*	Emergency Civil Rights
	*	Class Action
The Arrogant Orwellian Bureaucrats of the AETN;	*	Civil Action
The Crooked Lying Politicians;	*	No. 92-2190
The Special Interests; Including Certain Media "Personalities" Who Have Sold Out the People and Betrayed the Ethics and Principles of Professional Journalism; and Governor Clinton of the State of Arkansas;	*	
	*	
	*	
	*	
	*	
	*	
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	*	
	*	

Defendants

Filed: November 2, 1992

AMENDED COMPLAINT

COMES NOW, RALPH P. FORBES, as next best Friend of the People of Arkansas and that class of persons who are the legally qualified Voters of Arkansas' 3rd congressional district, and amends the pleadings to include commercial television broadcasting stations KHBS TV/Channel 40 UHF; its affiliate KHOG TV/Channel 29 UHF; The American Broadcasting Company aka ABC; and their agent Darrel Cunningham as additional defendants in the above styled matter.

The pleadings are herein adopted and realleged as if set out in full and every allegation is incorporated herein, and further cause of action is herein alleged against additional defendants as stated.

16. Plaintiff Forbes, a Citizen of the United States and the State of Arkansas with natural, God-given Rights secured by their respective Constitutions, is the legal Independent candidate for the office of Representative of Arkansas third congressional district. In the course of his campaign on behalf of the People, Taxpayers and *all* Persons in Arkansas he contracted with the defendants KHBS TV, et al, to run ads to educate and inform the Electorate and General Public of the facts his views that our problems were forewarned by our forefathers, and that we can only solve our problems by returning to our roots: America is and of right ought to be a Christian Nation; and that God cannot bless a nation with the sin of blood guilt on their hands.

17. The People are the sovereign power, under God, in the United States and in the State of Arkansas. The People have an inherent right to [a] choose their own representatives; and [b] be

fully informed, especially when they decide for themselves how to cast their ballots in important general elections. At least 174,185 voters from Arkansas' third congressional district cast ballots in the last gubernatorial election in 1990. This year they also have the right to cast ballots for the president of the United States and for a United States senator, so it is anticipated an even greater number of persons will vote on November 3rd. A large number of potential voters are disenchanted with the democratic process, and it is generally agreed that they will be aroused to participate by hearing new ideas, new candidates and new choices.

New Parties, Jurisdiction and Venue

18. Defendants KHBS TV and its sister affiliate KHOG TV are for profit corporations, affiliates of the American Broadcasting Company aka ABC and are licensed by the Federal Communications Commission and all conduct business throughout the State of Arkansas and the irreparable injuries against the people and plaintiff Forbes occurred with the third congressional district which lies with both the eastern and western judicial districts of Arkansas. In return for the extraordinary power, privilege and opportunity for profit temporarily bestowed upon them by the people entrusting them with a monopoly over the channel 29 and channel 40 broadcasting bands, respectively, the Defendants must comply with Title 47 USCA, Section 315 of the United States Code which states in pertinent parts:

"...such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

"Nothing in the foregoing sentence shall be construed as relieving broadcasters ... from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

19. Defendants are bound also by the Constitutions of the United States and the State of Arkansas, the Law of the Land, the lawful

courts, the FCC and its rulings, including FCC 8210-AJZ/MJM dated 21 August 1992 and attached hereto and incorporated herein and marked as Plaintiffs' #16.

20. Petitioner Forbes is a candidate for United States Congress and it is a great hardship and excessive burden upon him to be forced to leave the campaign trail to write legal pleas to protect his rights and the rights of the people.

21. It was the great and irreparable harm inflicted on the people and Candidate Forbes by AETN defendants that forced Forbes to file this complaint at this time. However, that injury by AETN is only one in "a long train of abuses and usurpations, pursuing invariably the same object (a supplanting of government by the people, of the people and for the people with government by the bureaucrats, of the politicians and for the special interests, which) evinces a design to reduce (the people) under absolute Despotism," it is the petitioner's right, it is the petitioner's duty to defend the people and their rights and to provide new Guards for their future security. {Paraphrased from our Declaration of Independence}

22. Petitioner Forbes, who is not backed by any PACs or special interests, caused to be produced a number of television ads to attempt to communicate his messages in less than 30 seconds.

23. Forbes caused to be delivered a preliminary version of the ads on 3/4" video tape to a number of commercial broadcast and cable television stations throughout the 3rd district, including KHOB TV.

24. These tapes contained the basic footage showing that aborticide kills babies, the ugly truth and fact that Forbes' political opponents do not want the American people to know.

25. At approximately 2:30 - 3 p.m. on Friday, October 30, 1992, Candidate Forbes brought a copy of the final version of his ads to KHOG affiliate in Fort Smith at.

26. Forbes gave the tape to Nancy Dolan who told Forbes the station could not legally censor nor refuse his spots, but they had to check them for certain technical specifications as to timing, scan lines, etc.

27. After waiting a long period of time, during which stations KHBS/KHOG TV broadcast programs containing materials that Forbes and millions of other Christians deem offensive, indecent, immoral and just plain garbage, at approximately 4:00 p.m. CST Defendant Cunningham asked Forbes to come into his office and close the door.

28. Defendant Cunningham then told Forbes he could not air his Pro-Life ads. Forbes protested that it was his right to run his ads. Defendant Cunningham said he had just been on the telephone with his lawyer and that the FCC had just issued a new ruling giving station management the power to relegate materials they subjectively decide as "indecent" to the "safe harbor" hours between 11:00 p.m. and 6:00 a.m.

29. Forbes then cited the facts in FCC 8210-AJZ/MJM on 21 August, 1992. Forbes then related that congressional candidate Michael Bailey had already had his footage showing the "products" of aborticide approved by the FCC in April and July of this year and the FCC had ruled such pictures were *not* "indecent," and that Forbes' footage was taken from the Bailey ads, but that Forbes had not included all of the footage, but only a portion of the permissible pictures. Forbes also told defendant Cunningham that similar ads had been challenged in federal courts and that the courts had ruled the spots were protected by the First Amendment. Defendant Cunningham said in effect that he did not care what the law or the courts said he was censoring and refusing Forbes' ads.

Please see Plaintiff's attachment, Letter from Candidate Bailey plus a video copy of the Bailey ads marked as Plaintiffs' #17.

30. Defendant Cunningham said that Forbes could move his spots from the chosen time periods to the late "safe harbor" times. Forbes protested that he picked the times he bought based on reaching the largest number of potential voters and forcing him to move to the undesirable times would irreparably harm his campaign. Defendant Cunningham said that was fine by him and said he would never run Forbes' ads in the favorable time slots. Forbes refused to give up his prime spots, but bought additional "safe harbor" slots under protest.

31. Forbes immediately attempted to call the FCC in Washington DC but the telephones were not answered.

Forbes repeated his efforts throughout the weekend, but the FCC was closed.

32. Friday night, October 30th, Forbes attempted to get justice by calling the clerk of court and the magistrate at the U.S. Courthouse in Fort Smith. Forbes was told no judge would be available to help him until Monday morning.

33. Forbes also called the federal court in Little Rock and eventually reached Circuit Judge Morris Arnold who was working after hours. Judge Arnold is an appellate judge and has no authority to issue injunctive relief in the first instance.

34. Saturday morning Forbes reached Indiana congressional candidate Michael Bailey. Bailey told Forbes that the FCC ruling did not apply to Forbes' Pro-Life ads, but that someone issued a misleading interpretation at the close of business hours and that apparently TV stations all over the country were given information they could use as a pretext to censor all Pro-Life ads during the final critical hours of the campaign because it would be at least late Monday before the mess could be corrected; and by then it would be too late and the harm to Pro-Life candidates nationwide would be irreparable However, as station management was notified of the facts they decided the Pro-Life spots could not be censored, denied or "moved to the back of the 'prime time' bus."

These stations include WAVE and WHAS 11 in Louisville/Cincinnati; the Denver stations, etc.

Please see Plaintiffs' attachment, newspaper article from page 4A of Sunday's, (November 1st) Arkansas Democrat Gazette marked as Plaintiffs' #18.

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment to the United States Constitution

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment to the United States Constitution

Candidate Forbes, has an equal right to accommodations, rights and privileges secured under the 14th Amendment to the United States Constitution and the Constitution of Arkansas as any other Citizen.

35. Plaintiff Forbes has suffered irreparable harm because of the unlawful, wicked, selective and invidious decision of KHBS defendants.

36. The most fundamental rights of the People to choose their own representatives based on informed consent have been flagrantly trespassed by the KHBS defendants.

This Complaint embraces and must comprehend a long string of abuses and pattern of continuing conspiracy against the people and their rights. The instant case against KHBS TV, et al, as

more fully shown is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their informed consent. And, therefore, Petitioner Forbes requires at least thirty (30) days past the election of November 3rd to adequately prepare his pleadings and he stipulates that no defendant is required to answer the complaint until after they have received the fully amended pleadings;

But, particular defendants must answer emergency petitions for injunctive relief that require immediate relief as a direct result of their violations of rights.

Therefore, from all of the above the newly added Defendants, KHBS/KHOG TV, ABC and its agent, Mr. Cunningham, have caused irreparable harm to the People by defrauding the People and robbing them of their fundamental birthright to be a free and independent self-governing people by censoring the political ads of plaintiff Ralph Forbes, the Independent Candidate, the only candidate who was put on the ballot by petition of the People to Represent them in the House of Representatives.

Wherefore, Petitioner prays that, in addition to punitive, remedial and exemplary damages to be decided by a jury and RICO treble damages if it be shown there was a criminal conspiracy by defendants, KHBS/KHOG-TV and ABC and Defendant Cunningham be penalized in accordance with 42 USC 1981, et seq., and appropriate provisions of Title 18 that award damages of $10,000 to persons whose civil rights have been violated, and that a Voter's Rights Trust Fund be established, funded by Two Billion Dollars ($2,000,000,000.00) in penalties from the defendants to see that each and every voter in Arkansas' third congressional district whose rights to Freedom of Information have been violated by the defendants will be compensated by law with an award of Ten Thousand Dollars ($10,000.00) *to each and every Voter in the third district.*

Respectfully submitted,

/s/ Ralph P. Forbes

Ralph P Forbes
in propia persona,
Box 88, London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

/s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 2 Day of Nov., 1992. My Commission expires June 30, 1996.

/s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, *Ralph Forbes*, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 2th Day of November, 1992, by hand or by U.S. mails as appropriate:

ABC; KHOG TV & KHBS TV
c/o Mr. Darrel Cunningham
Box 4150
Ft. Smith, AR 72914
501/783-4040

American Broadcasting Company
1330 Avenue of Americas
New York, NY 10019

Ms. Susan Howarth, Executive Director
AETN
350 S. Donaghey
Conway, AR 72032
501/682-4118 or 501/450-1727

Attorney General Winston Bryant
200 Tower Building
323 Center St.
Little Rock, AR 72201
501/682-2007

Plaintiff's Exhibit 16

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

21 AUG 1992

IN REPLY REFER TO:

8210-AJZ/MJM

Vincent A. Pepper, Esquire
Counsel, Gillett Communications of Atlanta, Inc.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Irving Gastfreund, Esquire
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

Dear Messrs. Pepper & Gastfreund:

This is in reference to the "Petition for Declaratory Ruling" filed on behalf of Gillett Communications of Atlanta, Inc. ("Gillett"), licensee of television station WAGA-TV, Atlanta, Georgia, as well as the "Petition for Declaratory Ruling" filed by Kaye, Scholer, Fierman, Hays & Handler ("Kaye Scholer"), a law firm representing "numerous" unnamed television and radio stations. These petitions both claim that federal candidate anti-abortion political advertisements featuring dead fetuses and fetal tissue depict excretory activity and are therefore indecent. Consequently, they seek our concurrence that channelling the advertisements to hours when children are unlikely to be in the audience would be consistent with the "reasonable access" and

"no-censorship" provisions of the Communications Act of 1934, as amended (Sections 312(a)(7) and 315, respectively).

Factual Background

Gillett poses the following question:

> Whether a licensee may channel a use by a legally-qualified federal candidate to a safe harbor when children are not generally present in the audience if the licensee determines in good faith that the proposed use is indecent or otherwise unsuitable for children.

Gillett states that certain political advertisements feature graphic depictions of dead fetuses and that the candidate-sponsors of these advertisements have sought and obtained broadcast time on WAGA-TV pursuant to the reasonable access (2) provisions of Section 312(a)(7). For example, Gillett states that Daniel Becker, legally qualified Republican candidate for Congress, placed a political advertisement on WAGA-TV, which aired on July 19, 1992, at 7:58 p.m., and that the ad included depictions of dead fetuses. Gillett has provided a tape of the advertisement. Gillett asserts that, because such candidate appearances are "uses," under Section 73.1941(b) of the Commission's Rules, WAGA-TV must air them uncensored under the no-censorship provision of Section 315 of the Communications Act of 1934, as amended. Gillett argues that this and similar advertisements are indecent under 18 U.S.C. § 1464 and that, to avoid prosecution under the indecency statute, licensees should be allowed to "channel" them to times when there is no reasonable risk of children in the audience. Gillett believes the material in Becker's tape, as well as the depictions in other candidate advertisements it anticipates receiving, which feature dead fetuses covered with "menstrual gore," constitute "excretory activity." As such, Gillett would have the Commission find them indecent.

Kaye Scholer advances a similar argument not tied to a specific political advertisement, but with respect to an entire class of programming "containing graphic and shocking depictions of dead, bloodied or aborted fetuses or of any other similar graphic and shocking depictions of excised or bloody fetal tissue." Kaye Scholer requests that even if we determine that such content does not constitute "excretory activity" under the indecency definition, we defer to a licensee's reasonable good faith judgment that such content is indecent and that it should therefore be channelled to times when there is no longer a reasonable risk that children are in the audience.

Discussion

To the extent these petitions seek a general ruling by the Commission that a class of program material -- that is, any depiction of dead fetuses or fetal tissue -- is indecent, we decline to so rule. Such a broad, case-independent determination would be inconsistent with the Commission's long-held view that indecency determinations must be based on the specific factual context in which the allegedly offensive material appears. The declaratory nature and prospective application of the relief that petitioners request are also at odds with Commission decisions that have declined to render indecency rulings in advance of broadcasts to avoid imposing prior restraints on protected speech. See Letter to William J. Byrnes, Esquire (WBAI(FM)), 63 RR 2d 216 (MMB 1987), review denied sub nom. Pacifica Foundation, Inc., FCC 87-215, released June 16, 1987; Letter to Christian Action Network, (MMB) released June 12, 1992.

Similarly, we cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as (3) indecent so that they may restrict the time at which it airs even where it does not meet the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise "unsuitable" for children. Such channelling would

violate a federal candidate's reasonable access rights under Section 312(a)(7) of the Act, which requires broadcasters to permit legally qualified candidates "reasonable access" to their facilities. As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening. We have also ruled that candidates are entitled to access to "prime time." Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1090 (1978). Although federal candidates are not entitled access to specific programs, such as news programming, (Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 682 (1991)), they cannot be banned from entire dayparts. 68 FCC 2d at 1091. Therefore, the practice of channelling material that is not indecent, even if content-neutral (i.e., channelling all federal candidates to specific times of the day or evening when there may be no reasonable risk of children in the audience) would deprive federal candidates of their rights to determine how best to conduct their campaigns. See CBS, Inc., 453 U.S. 367 (1981).[1] Similarly, such channelling could impinge upon the rights of state or local candidates to equal opportunities under Section 315.

Accordingly, we decline to grant the general declaratory relief that petitioners seek. As noted earlier, however, Gillett

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1 In fact, Gillett would have us adopt a policy eroding a federal candidate's reasonable access right to prime time by restricting those candidates to placement during the "later hours of prime time." This represents a much broader restriction than might be occasioned even if we were to apply the indecency restrictions to the material at issue. Pending further Commission action defining an appropriate "safe harbor" (see Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991)), indecency enforcement is currently restricted to material aired between 6:00 a.m. and 8:00 p.m. See Kansas City Television, Ltd., 4 FCC Rcd 6706 (1989).

has submitted a tape of a specific political advertisement, prepared on behalf of a legally qualified federal candidate, that has already been broadcast by WAGA-TV pursuant to the reasonable access provisions of Section 312(a)(7) of the Act and which includes depictions of dead fetuses. In the context of this past broadcast, we believe it is appropriate to respond to petitioner's request for an indecency determination.

Gillett asserts that the advertisement at issue contains "six shots of aborted fetuses" . . . badly discolored in whole or (4) in part, [some of which] appear covered with a wet, dark, shiny substance," and that this constitutes a depiction of "excretory activity" within the scope of the Commission's indecency definition. We do not agree.

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." Infinity Broadcasting Corporation of Pennsylvania, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

Upon review of the tape submitted by Gillett, we conclude that the advertisement is not indecent. We decline to rule that what is involved here is an "excretory activity" under the indecency definition. Neither the expulsion of fetal tissue nor fetuses themselves constitutes "excrement."[2] Petitioners have

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2 Webster's Dictionary defines "excrement" as "waste material, especially fecal matter, expelled from the body after digestion." Webster's II New Riverside University Dictionary, p. 451 (1984). (continued...)

not provided Commission precedent that would bring images such as those at issue here within the definition of "excretory" (and, therefore, the definition of indecency) and we are not inclined to expand that definition sua sponte.[3]

Finally, although we find the broad prospective relief that petitioners seek to be inconsistent with the "reasonable access" provision of the Act, we do not believe broadcasters are without recourse in providing their viewers with appropriate warnings where, in the licensees' good faith judgment, the material presented in a political use program could be disturbing to child viewers. In the circumstances presented here we would not regard such an advisory, presented in a non-editorializing and neutral (5) fashion, to either violate the no-discrimination rules of Section 73.1940(c) or to invoke the political editorializing provisions of Section 73.1930. An example of an acceptable viewer advisory would be: "The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised." We believe that, in view of Commission and congressional interest in serving the special needs of children, see, e.g., Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991)), such advisories represent a reasonable

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2 (...continued)
Federal case law has been similarly restricted in scope. See, e.g., L.M. Communications, 7 FCC Rcd 1595 (MMB 1992); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

3 Because we decline to find this political advertisement indecent, we need not reach the issue of whether the criminal indecency statute, 18 U.S.C. Section 1464, overrides either the provisions of Section 315 or the reasonable access provision of Section 312(a)(7) of the Act. See Letter from Mark S. Fowler to Honorable Thomas A. Luken, released January 19, 1984 (staff advisory opinion indicating that certain types of speech may not be subject to the Section 315 no-censorship provision).

accommodation between protection of the child audience and potential conflicts with the provisions of the political broadcasting regulations.[4]

In view of the foregoing, the requests for declaratory ruling by Gillett Communications of Atlanta, Inc., and Kaye, Scholer, Fierman, Hays & Handler ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Roy J. Stewart

Roy J. Stewart, Chief
Mass Media Bureau

202 632- _ _ 60

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4 The Bureau has determined that the selective use of general disclaimers, such as "these views are not necessarily the views of the station," in connection with political advertisements is not permissible under the Commission's anti-discrimination policies because such use could be construed as an endorsement of one candidate over another. See Southern Arkansas Radio Company, 5 FCC Rcd 4643 (MMB 1990). We do not believe, however, that the selective, good-faith use of an audience advisory concerning material in political advertisements that is potentially disturbing to children presents a similar risk. Accordingly, we do not find the "equal treatment" requirements applicable to general disclaimers to pose any bar to the well-considered and selective use of audience advisories in circumstances such as those considered here.

Plaintiff's Exhibit 17

BAILEY
FOR LIFE FOR
CONGRESS

September 25, 1992

Ralph Forbes
Forbes for Congress Committee
P.O. Box 88
London, AR 72847

Dear Mr. Forbes:

We are grateful to God for you and your commitment to the causes bigger than ourselves! You have my full and unconditional permission to use the enclosed tape featuring eight political commercials during this 92 election cycle.

In the service of Jesus Christ,

/s/ Michael E. Bailey

Michael E. Bailey

P.O. Box 264 • Georgetown, Indiana 17122 • (812) 952-3184

Plaintiff's Exhibit 18

Arkansas Democrat Gazette
• SUNDAY, NOVEMBER 1, 1992•

Ads showing abortions wrongly removed from prime-time slots, candidates say

The Associated Press

WASHINGTON -- Candidates opposed to abortion said Saturday that local television stations are misinterpreting a judge's ruling and illegally removing their political ads from prime viewing times.

The stations said the ruling allows them to reschedule indecent ads that have offended viewers.

Television stations which had been airing spots for U.S. Senate candidates Chad Koppie of Illinois and Matt Noah of Colorado notified the candidates Friday that they would no longer broadcast the ads showing aborted fetuses during daytime and prime-time hours.

Noah is a member of the Christian Pro-Life Party and Koppie is running under the Conservative Party of Illinois banner.

The decisions by WAND-TV of Decatur, Ill., and KUSA-TV and KMGH-TV of Denver followed a memo from the National Association of Broadcasters advising stations what to do in light of a federal court ruling and Federal Communications Commission opinion late Friday against another, more graphic 30-minute "infomercial" for a candidate opposed to abortion in Georgia.

"My ads are only similar (to the Georgia ad) in that abortion is the theme," said Noah, who added that he will take

legal action against the Denver stations if they don't put his ads back on the air.

The ad for Daniel Becker, the Republican candidate for Georgia's 9th Congressional District seat, shows an abortion taking place and was ruled "indecent" programming that could be restricted to the hours between midnight and 6 a.m.

That time slot is the only time in which programming that graphically depicts sexual or excretory organs can be broadcast.

U.S.-District Judge Robert Hall's ruling that WAGA-TV in Atlanta could limit broadcasts of Becker's ad was backed by a letter from the FCC's mass media bureau.

This led to the National Association of Broadcasters memo advising television station executives nationwide to consider the Georgia decision and contact their lawyers before acting against any similar ads on their stations.

United States District Court
Western District of Ark.

Forbes & The People SUMMONS IN A CIVIL ACTION

V. CASE NUMBER: 92-2190

The Arrogant Orwellian's
Bureaucrats, et al

TO: (Name and Address of Defendant)

Mr. David Cunningham
KHBS-TV
Box 4150
FT Smith AR 72914

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon PLAINTIFF'S ATTORNEY (name and address)

Ralph P. Forbes Prose
Bx 88
London AR 72847 501 293-4

as answer to the complaint which is herewith served upon you, within -20- days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[illegible stamp] NOV 2 1992
CLERK DATE

/s/ [illegible signature]
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and The People *
*
Plaintiffs *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats of the Arkansas *
Educational Television *
Commission Network *
Foundation and its Board of *
Directors in their Official *
Capacities; The Arkansas *
Educational *
Telecommunications and its *
Members and Officers; *
Susan J. Howarth, in her *
official capacity as Executive *
Director; Victor Fleming, *
in his official capacity as *
Chairman; G.E. Campbell, *
in his official capacity as *
Vice Chairman; Dr. Caroline *
Whitson, in her official *
capacity as Secretary; *
Commissioner Diane Blair, *
in her official capacity; *

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager; William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

Filed: November 10, 1992

MOTION TO DISMISS

Come the separate defendants, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton, and for their motion to dismiss the Complaint, Demand for Declaratory Judgment and Motion for Emergency TRO pursuant to Rule 12(b)(1), (2) and (6), state as follows:

I.

The Court lacks jurisdiction over the subject matter and persons of the separate defendants under the Eleventh Amendment to the United States Constitution as to plaintiff's claim for damages.

II.

Plaintiff fails to state a claim upon which relief can be granted as follows:

(a) Plaintiff Forbes does not possess the interest and does not share the claimed injury of the members of the purported class pursuant to Rule 22, Federal Rules of Civil Procedure;

(b) Plaintiff Forbes has no First or Fourteenth Amendment right to appear on a public television political debate;

(c) Plaintiff Forbes has no personal claim or cause of action under the Federal Communications Act to appear on a public television political debate;

(d) Plaintiff has failed to state a claim against defendant Oliver;

(e) Plaintiff has failed to state a claim against defendant Clinton;

(f) Plaintiff has failed to state a claim under 42 U.S.C. § 1981 et seq.;

(g) The date and election at issue herein have passed and the issues regarding the appearance on the public television debate have become moot;

III.

This Court lacks jurisdiction of or should not exercise its jurisdiction over any claims under the state law.

WHEREFORE, the separate defendants move the Court to order that the plaintiff's complaint be dismissed in its entirety and for all other proper relief.

Respectfully submitted,

WINSTON BRYANT
Attorney General

By: /s/ Thomas S. Gay by TH
THOMAS S. GAY, #77053
Senior Assistant
Attorney General
323 Center St., Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for Separate
Defendants

CERTIFICATE OF SERVICE

I, Thomas S. Gay, certify that a copy of the foregoing document has been served by U.S. Mail, postage prepaid, this 9th day of November, 1992, to Ralph P. Forbes, Box 88, London, AR 72847.

/s/ Thomas S. Gay by TH
Thomas S. Gay

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph P. Forbes and The People	*
	*
Plaintiffs	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission, and its Board of	*
Directors in their Official	*
Capacities; KHBS TV Channel	*
40; KHOG TV Channel 29 and	*
Darrell Cunningham, in his	*
individual capacity; et al.	*
	*
Defendants	

Filed: December 17, 1992

ORDER

On this 16th day of December, 1992, upon consideration of defendants' motions to dismiss, the court finds for the reasons set forth in a letter of even date that said motions should be and hereby are granted and this case is dismissed with prejudice.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

This document entered
on docket in compliance
with Rule 58 and 79(a),
FRCP,
on 12/17/92 by /s/

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes *
*
Plaintiff *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats of the Arkansas *
Educational Television *
Commission Network *
Foundation and its Board of *
Directors in their Official *
Capacities; The Arkansas *
Educational *
Telecommunications and its *
Members and Officers; *
Susan J. Howarth, in her *
official capacity as Executive *
Director; Victor Fleming, *
in his official capacity as *
Chairman; G.E. Campbell, *
in his official capacity as *
Vice Chairman; Dr. Caroline *
Whitson, in her official *
capacity as Secretary; *
Commissioner Diane Blair, *
in her official capacity; *

Commissioner S. McAdams, in *
his official capacity; *
Commissioner James Ross, in *
his official capacity; *
Commissioner Jerry McIntosh, *
in his official capacity; *
Commissioner Lillian Springer, *
in her official capacity; *
Amy L. Oliver, in her *
official capacity as Production *
Manager; William Clinton, *
in his official capacity as *
Governor of the State of *
Arkansas; and certain *
"John Doe" Crooked, Lying *
Politicians and Political *
"Dirty Tricks" Operatives; *
the Special Interests That *
Control the Politicians and *
Exert Illegal Influence on *
AETN *
*

Defendants

Filed: July 11, 1994

ANSWER

Come the defendants, Arkansas Educational Telecommunications Network Foundation and its Board, in their official capacities, Arkansas Educational Telecommunications Commission, its members and officers, Susan J. Howarth in her official capacity as Executive Director; Victor Fleming in his official capacity as Chairman; G. E. Campbell in his official capacity as Vice Chairman; Dr. Carolyn Whitson in her official

capacity as Secretary; Commissioner Diane Blair in her official capacity; Commissioner S. McAdams in his official capacity; Commissioner James Ross in his official capacity; Commissioner Jerry McIntosh in his official capacity; Commissioner Lillian Springer in her official capacity; Amy L. Oliver in her official capacity as Production Manager; and William Clinton in his official capacity as Governor of the State of Arkansas (hereinafter referred to as "AETN defendants"), by counsel, and for their response to plaintiff's complaint, amended complaint and all other pleadings herein, state as follows:

1. AETN defendants admit that the Arkansas Educational Telecommunications Commission ("the Commission") was created by the Arkansas General Assembly by Act 198 of 1961, A.C.A. § 6-3-101 et seq.; the Commission holds licenses from the Federal Communications Commission (F.C.C.) to broadcast public television stations comprising the Arkansas Educational Telecommunications Network (AETN).

2. AETN defendants admit that the Arkansas Educational Telecommunications Network Foundation was created in 1984; its purposes include, but are not limited to, to obtain, hold, invest, reinvest and administer funds and other property for the benefit of AETN.

3. The AETN defendants admit that during the time period of August 17, 1992, through October 22, 1992, Susan J. Howarth was Executive Director of AETN.

4. AETN defendants admit that during the time period of August 17, 1992, through October 22, 1992, Amy L. Oliver was Production Manager for AETN.

5. AETN defendants admit that during the time period August 17, 1992, through October 22, 1992, Defendants Fleming, Whitson, Blair, Ross, McIntosh, and Springer were Arkansas Educational Telecommunications Commission members; Defendants Campbell and McAdams' terms as Commissioners

expired prior to August 17, 1992, and they were no longer Commissioners.

6. AETN defendants admit that William Clinton was Governor of the State of Arkansas and appointed members to Arkansas Educational Telecommunications Commission during his terms as Governor.

7. AETN defendants admit that AETN and the Associated Press proposed to broadcast a television show featuring a debate on or about October 22, 1992, between the two major party candidates in the 1992 general election for the Third Congressional District.

8. AETN defendants admit that plaintiff was not scheduled to participate in said broadcast.

9. AETN defendants admit that by letter dated August 24, 1992, plaintiff requested that he be included in said broadcast.

10. AETN defendants admit that by letter dated September 4, 1992, defendant responded to plaintiff's letter regarding said debate. Defendant Howarth notified plaintiff that said debate was exempt from the equal opportunity requirements under 47 U.S.C. § 315 and that AETN had determined in its bona fide journalistic judgment to limit said debate to the elected nominees of the two major parties. Plaintiff was advised of his administrative remedy with the Federal Communications Commission and was given the appropriate telephone number for the Commission. A copy of said letter is attached hereto as Exhibit A and is incorporated by reference herein.

11. AETN defendants affirmatively plead that plaintiff was not scheduled to participate in said broadcast because in the journalistic judgment of the AETN staff, plaintiff was not perceived as a viable candidate and limiting the broadcast to the two major party candidates would provide to viewers the maximum amount of information about the two candidates most

likely to be elected in the allocated time period in a debate format; said programming decision was not the result of plaintiff's view points.

12. AETN defendants each sufficient information or belief regarding plaintiff's alleged contact with the F.C.C. as to AETN's decision to limit the broadcast program to the two major party candidates; defendants therefore deny each and every material allegation regarding plaintiff's alleged contact, communications and other dealings with the F.C.C.

14. AETN defendants generally and specifically deny each and every material allegation set forth in plaintiff's pleadings not expressly admitted herein.

15. AETN defendants affirmatively plead that plaintiff failed to exhaust his administrative remedy before the F.C.C.

16. AETN defendants affirmatively plead that Defendant Clinton is protected by absolute immunity as President of the United States.

17. AETN defendants affirmatively plead that should the court determine the individual defendants herein are sued in their individual capacities, defendants are entitled to qualified immunity because of their reasonable reliance upon existing law and judicial and administrative interpretations thereof.

18. AETN defendants affirmatively plead that the planning for and broadcast of said debate was by staff and that neither the Foundation Board or its members nor the AETN Commission or its members participated in same.

19. AETN defendants affirmatively plead that the F.C.C. has exclusive jurisdiction over plaintiff's complaint regarding not being included in said debate.

20. AETN defendants affirmatively plead that plaintiff lacked standing to litigate issues on behalf of voters in the Third Congressional District or on behalf of any other person.

21. AETN defendants affirmatively plead that plaintiff has failed to state any claim upon which relief can be granted against any defendant.

22. AETN defendants affirmatively plead that the court lacks jurisdiction over the subject matter of this action and the persons of the AETN defendants.

23. AETN defendants affirmatively plead that they are immune from suit for damages pursuant to the Eleventh Amendment to the United States Constitution.

24. AETN defendants affirmatively plead they are not persons pursuant to 42 U.S.C. § 1983.

25. AETN defendants affirmatively plead that they are immune from suit and liability under state law pursuant to Art. 5, § 20 of the Arkansas Constitution and A.C.A. § 19-10-305.

26. AETN defendants affirmatively plead that plaintiff's claim to appear on the 1992 debate is moot.

27. AETN defendants generally and specifically deny the existence of any John Does or special interests that control the politicians and exert illegal influence on AETN.

28. AETN defendants are contemporaneously serving and filing herewith a motion to stay proceedings herein pending a determination by the Supreme Court whether to grant certiorari on a petition to be prepared and filed by appellees in No. 93-1031 WA, Eighth Circuit Court of Appeals.

WHEREFORE, AETN defendants pray that plaintiff's complaint and other pleadings herein be dismissed, for its costs and all other proper relief.

Respectfully submitted,

WINSTON BRYANT
Attorney General

By: /s/ Thomas S. Gay
THOMAS S. GAY, #77053
Senior Assistant
Attorney General
323 Center St., Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Thomas S. Gay, Senior Assistant Attorney General, do hereby certify that I have served the foregoing by mailing two copies of same, U.S. Mail, postage prepaid to Ralph P. Forbes, Box 88, London, AR 72847, on this 11th day of July 1994.

/s/ Thomas S. Gay
THOMAS S. GAY

573ncc

Exhibit A

September 4, 1992

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This is written in response to your letter of August 24 regarding the congressional debate produced, jointly, by AETN and the Associated Press.

Under 47 USC 315, as interpreted by the Federal Communications Commission and the Courts, debates are exempt from the equal opportunity requirement.

AETN has made a bona fide journalistic judgement that our viewers would best be served by limiting the debate to elected nominees of the two major parties.

Your letter indicates an interest in an administrative appeal of an adverse decision. You should feel free to contact the Fairness/Political Programming Branch of the Enforcement Division, Federal Communications Commission, Area Code 202-632-7586.

Sincerely,

/s/ Susan Howarth

SUSAN HOWARTH
Executive Director

PS: Mail intended for AETN management should be addressed to P.O. Box 1250, Conway, AR 72032, P.O. Box 100 is a bank dropbox and mail so addressed reaches us one to three days after arrival in the Conway Post Office.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes	*
	*
Plaintiff	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission Network	*
Foundation and its Board of	*
Directors in their Official	*
Capacities; The Arkansas	*
Educational	*
Telecommunications and Its'	*
Members and Officers;	*
Susan J. Howarth, in her	*
official capacity as Executive	*
Director; Victor Fleming,	*
in his official capacity as	*
Chairman; G.E. Campbell,	*
in his official capacity as	*
Vice Chairman; Dr. Caroline	*
Whitson, in her official	*
capacity as Secretary;	*
Commissioner Diane Blair,	*
in her official capacity;	*

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager, William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

Filed: May 5, 1995

DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS

Defendants Arkansas Educational Television Commission, Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Any L. Oliver, and William Clinton (AETN Defendants"), by their counsel, respectfully move this Court for an Order dismissing G.E. Campbell and S. McAdams from this case. A memorandum in support of this motion is attached.

Respectfully submitted,

/s/ Richard D. Marks
Richard D. Marks
Admitted *pro hac vice*
Karen A. Post
Admitted *pro hac vice*
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street
Suite 500
Washington, D.C. 20037
(202) 857-2565

-and-

Thomas S. Gay
Arkansas Bar No. 77053
Senior Assistant
Attorney General's Office
323 Center Street
Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for the AETN
Defendants

Dated: May 4, 1995

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes *
*
Plaintiff *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats of the Arkansas *
Educational Television *
Commission Network *
Foundation and its Board of *
Directors in their Official *
Capacities; The Arkansas *
Educational *
Telecommunications and Its *
Members and Officers; *
Susan J. Howarth, in her *
official capacity as Executive *
Director; Victor Fleming, *
in his official capacity as *
Chairman; G.E. Campbell, *
in his official capacity as *
Vice Chairman; Dr. Caroline *
Whitson, in her official *
capacity as Secretary; *
Commissioner Diane Blair, *
in her official capacity; *

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager, William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS

Defendants Arkansas Educational Television Commission, Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton ("AETN Defendants"), by their counsel, respectfully submit this memorandum in support of their motion to dismiss certain defendants.

This case arises from the decision of the Arkansas Educational Television Network ("AETN") not to extend an invitation to the plaintiff, Ralph P. Forbes, to a televised debate in October 1992. The plaintiff named as defendants, among others, all those who he believed were then members of the Arkansas Educational Television Commission ("AETC"). However, the plaintiff erred. Both defendants G.E. Campbell and S. McAdams were not members of AETC at the time the events at issue in this case took place. The attached certified copies of the Governor's Official Appointments demonstrate (a) that on April 10, 1992, Lavenia Craig was appointed to AETC, replacing George E. Campbell, and (b) that on May 14, 1992, Robert Doubleday was appointed to AETC, replacing Sheila McAdams. See Exhibits 1 & 2. Thus, neither G.E. Campbell nor S. McAdams was a commissioner in October 1992. Accordingly, this Court should dismiss both G.E. Campbell and S. McAdams from this case.1/

1/ The AETN Defendants are not opposed to the Court's substituting Ms. Craig and Mr. Doubleday for Mr. Campbell and Ms. McAdams, if it deems substitution to be proper.

Respectfully submitted,

/s/ Richard D. Marks
Richard D. Marks
Admitted *pro hac vice*
Karen A. Post
Admitted *pro hac vice*
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street
Suite 500
Washington, D.C. 20037
(202) 857-2565

-and-

Thomas S. Gay
Arkansas Bar No. 77053
Senior Assistant
Attorney General's Office
323 Center Street
Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for the AETN
Defendants

Dated: May 4, 1995

Exhibit No. 1

79

GOVERNOR'S OFFICE
OFFICIAL APPOINTMENTS
STATE BOARDS, COMMISSIONS, AND DEPARTMENT HEADS

Little Rock, Ark., April 10, 1992

TO THE SECRETARY OF STATE:

Under the provisions of Act _____ of 19____
I have, as of this date, appointed Lavenia "Vennie" Craig whose address is 600 East Ninth El Dorado Union as a member of the
(Street) (City) (County)
Ark. Educational Television Network Commission
(Board, Commission or Department)
for the term which expires on March 23, 2000. Replaces George E. Campbell
$ ——— attached herewith to pay required fee.

Date Qualified _____

Folio No. _____ /s/ Bill Clinton
(Governor)

By /s/ Patsy Gatlin
(Secretary)

Form G-2

CERTIFICATION

I, Sharon Priest, Secretary of State, State of Arkansas Certify that this document is a true and accurate copy of the appointment on file in this office.

/s/ Sharon Priest
Sharon Priest
Secretary of State

Exhibit 2

79

GOVERNOR'S OFFICE
OFFICIAL APPOINTMENTS
STATE BOARDS, COMMISSIONS, AND DEPARTMENT HEADS

Little Rock, Ark., May 14, 1992

TO THE SECRETARY OF STATE:

Under the provisions of ~~Act~~ ACA 17-93-301 ~~of 19~~____ I have, ~~as of~~ on this date, appointed Robert Doubleday whose address is 1912 Beachwood St. Little Rock Pulaski
(Street) (City) (County)
as a member of the
Ark. Educational Television Network Commission
(Board, Commission or Department)
for the term which expires on March 27, 1997. Replaces Sheila McAdams
$ _____ attached herewith to pay required fee.

Date Qualified _____

Folio No. _____

/s/ [illegible]
(Governor)

By /s/ [illegible]

(Secretary)

CERTIFICATION

I, Sharon Priest, Secretary of State, State of Arkansas Certify that this document is a true and accurate copy of the appointment on file in this office.

Date:_____

/s/ Sharon Priest
Sharon Priest
Secretary of State
State of Arkansas

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS and MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CERTAIN DEFENDANTS this 4th day of May, 1995, by first-class U.S. Mail postage prepaid, upon the following:

Ralph P. Forbes
Box 88
London, Arkansas 72847

/s/ Karen A. Post
Karen A. Post

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes	*
	*
Plaintiff	*
	*
v.	*
	*
The Arrogant Orwellian	*
Bureaucrats of the Arkansas	*
Educational Television	*
Commission Network	*
Foundation and its Board of	*
Directors in their Official	*
Capacities; The Arkansas	*
Educational	*
Telecommunications and its	*
Members and Officers;	*
Susan J. Howarth, in her	*
official capacity as Executive	*
Director; Victor Fleming,	*
in his official capacity as	*
Chairman; G.E. Campbell,	*
in his official capacity as	*
Vice Chairman; Dr. Caroline	*
Whitson, in her official	*
capacity as Secretary;	*
Commissioner Diane Blair,	*
in her official capacity;	*

Commissioner S. McAdams, in his official capacity; Commissioner James Ross, in his official capacity; Commissioner Jerry McIntosh, in his official capacity; Commissioner Lillian Springer, in her official capacity; Amy L. Oliver, in her official capacity as Production Manager, William Clinton, in his official capacity as Governor of the State of Arkansas; and certain "John Doe" Crooked, Lying Politicians and Political "Dirty Tricks" Operatives; the Special Interests That Control the Politicians and Exert Illegal Influence on AETN

Defendants

Filed: May 22, 1995

PROPOSED JURY INSTRUCTIONS

Defendants Arkansas Educational Television Commission, Arkansas Educational Telecommunications Network Foundation, Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, Sheila McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver, and William Clinton ("AETN Defendants"), by their counsel, submit the following Proposed Jury Instructions:

(1) If you find that AETC's decision not to invite Forbes to participate in the televised debate was not influenced in any way by political or administrative pressure from the State of Arkansas, you must find for the defendants.

(2) If you find that AETC's decision not to invite Forbes to participate in the televised debate was influenced in any way by political or administrative pressure from the State of Arkansas, then must you consider whether Ms. Howarth or any member of her professional staff considered Forbes' views in deciding not to invite Forbes to participate in the televised debate. If you find that Ms. Howarth and her professional staff did not consider Forbes' views in deciding not to invite Forbes to participate in the televised debate, you must find for the defendants. If you find that Ms. Howarth or any member of her professional staff did consider Forbes' views in deciding not to invite Forbes to participate in the televised debate, you must find for the plaintiffs.

Respectfully submitted,

/s/ Karen A. Post
Richard D. Marks
Admitted pro hac vice
Karen A. Post
Admitted pro hac vice
DOW, LOHNES & ALBERTSON
1255 Twenty-third Street
Suite 500
Washington, D.C. 20037
(202) 857-2565

-and-

Thomas S. Gay
Arkansas Bar No. 77053
Senior Assistant
Attorney General's Office
323 Center Street
Suite 200
Little Rock, AR 72201-2610
(501) 682-2007

Attorneys for the AETN
Defendants

Dated: May 19,1995

CERTIFICATE OF SERVICE

I hereby certify that I have served the AETN Defendants' Proposed Jury Instructions this 19th day of May, 1995, by first-class mail, postage prepaid, upon:

Ralph P. Forbes
Box 88
London, Arkansas 72847

/s/ Karen A. Post
Karen A. Post

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

No. 92-2190

Ralph Forbes *
*
Plaintiff *
*
v. *
*
The Arrogant Orwellian *
Bureaucrats, et al. *
*
Defendants *

Filed: May 23, 1995

ORDER

On this 22nd day of May, 1995, came on for consideration the defendants' motion to amend the caption and the defendants' motion to dismiss certain defendants.

The defendants request that the caption be amended to delete slanderous and prejudicial language. Defendants also request that the caption be altered to reflect the correct names of the corporate entities the plaintiff has sued. In connection with their motion to amend the caption, defendants also filed a motion to dismiss two

defendants, G.E. Campbell and S. McAdams. Both were former commissioners who were not serving as commissioners at the time the decision in question was made. Instead, G.E. Campbell and S. McAdams had been replaced by Lavenia Craig and Robert Doubleday.

Plaintiff has responded to the motions indicating he does not object to the amendment of the caption or to the dismissal of G.E. Campbell and S. McAdams. Accordingly, the motion to dismiss G.E. Campbell and S. McAdams is granted. The court will substitute as defendants the successors of the two commissioners who were improperly named. The motion to amend the caption is also granted. The caption should heretofore be as follows:

Ralph Forbes	*	
	*	
Plaintiff	*	Civil No. 92-2190
	*	
v.	*	
	*	
The Arkansas Educational	*	
Television Commission, The	*	
Arkansas Educational	*	
Telecommunications Network	*	
Foundation, Susan J.	*	
Howarth, in her official	*	
capacity, Amy Oliver, in her	*	
official capacity, Victor	*	
Fleming, in his official	*	
capacity, Dr. Caroline	*	
Whitson, in her official	*	
capacity, Diane Blair, in her	*	
official capacity, James Ross,	*	
in his official capacity, Jerry	*	
McIntosh, in his official	*	
capacity, Lillian Springer, in	*	
her official capacity, Lavenia	*	
Craig, in her official	*	
capacity, Robert Doubleday,	*	
in his official capacity, and	*	
William Clinton, in his official	*	
capacity	*	

Defendants

In his response, plaintiff requests that the court substitute in the place of the previously named "John Doe" defendants, the following individuals as employees of AETN: (1) Oscar Eugene Goss, Arkansas Educational Television Network; (2) Steve Barnes, KARK TV, 4 Eye-Witness News and AETN Producer; (3) Bill Simmons, Associated Press, Chief of Bureau/Arkansas; (4) Carol

Adornetto; and (5) Larry Foley. The court is further asked to shorten the time for discovery with respect to these and all other persons. Plaintiff further states that upon discovery he may find out the names of other persons who should be named as defendants. He therefore asks that the caption retain the "John Doe" or unnamed defendants. These requests are denied. This matter is set for trial the week of June 5, 1995, two weeks from today. The court's scheduling order provides that no discovery shall occur, except upon agreement by the parties, within thirty days prior to the scheduled trial date. The court cannot allow the plaintiff to name new defendants at this stage of the case; nor can the court allow the plaintiff to begin wholesale discovery when he should be preparing for trial or responding to the various motions pending in the case.

Finally, plaintiff has submitted a number of petitions filed on behalf of individuals seeking to join as plaintiffs in this case. The petitions to join as plaintiffs and members of an injured class are denied as untimely.

IT IS SO ORDERED.

/s/ H. Franklin Waters
United States District Judge

HFW/sg

Direct Examination of Ralph P. Forbes

[116] Let me testify as to the news media's interest in my candidacy. In November of 1991, I received confidential information that Congressman John Paul Hammerschmidt was not going to run for reelection, and it was suggested that I seek his -- seek that seat that he would be vacating. I then put out -- I then talked about it and thought about whether I should run or not, and in the course of that investigation on my part, I received a telephone call from Sid Tobinon who was the reporter for the *Arkansas Democrat* in the Fayetteville area at that time.

And I told her that because of past experiences I felt that the media would try to ruin any campaign I would try to undertake at that time, and I asked her to not publish anything and that if I decided to run I would give her an exclusive and I would tell her about it first. She agreed to that, and then at a later time, approximately March of that year, a number of people in the media including, I believe, the Associated Press, and in particular I remember the Eye on America for CBS, a national television organization, flew into Arkansas, and I told them I really didn't want any publicity. They said they thought my candidacy was important, and they wanted to do a news story on it, and they did. It was broadcast I believe in March or April of 1992, about at the time I started the petition drive.

When I started the petition drive, there were all [117] kinds of headlines with my name on it saying I was trying to run. The stories were not – I didn't think they were intended to be helpful; nevertheless our experience was that – my personal experience is that nine out of ten people that I ask in all 16 counties in the Third District, all of them signed.

Many of them signed because they wanted me to be elected. Others signed because they thought at least they wanted an alternative, but nine out of ten – this is my testimony, and it would be the testimony of anyone else that helped me on the drive that about nine out of ten people that we asked who were qualified voters in this Third District signed their petitions.

Well, I met the deadline. I turned in a sufficient number of signatures. I believe it was the end of April if I recall correctly.

At that time I was told that -- or about that time I was told by Mr. Fincher, Secretary of State's Office, that unless all of my signatures from petitioners on the same sheet were by voters from the same county, they couldn't be counted, and this caused me to go on another petition drive in a certain short period of time, but by that time we knew how to really go out and get them, but it's still difficult, even under the best conditions, 20 signatures an hour is very good.

It's just -- there's no way that -- maybe 30 an hour [118] rarely, but that's about the maximum anyone could do.

So it takes 10, 12 hours a day to get even a few hundred signatures, and went on the second drive and during the course of that time, in Benton County, for example, a police officer threatened to arrest me if I continued to collect signatures in Benton County. There was a lot of obstacles. It was not an easy task for me or anyone else. When we got on the ballot, even before I got on the ballot there were a lot of people that were aware -- I was collecting signatures and doing very well.

There were probably about ten people that -- the news media would call me up and ask me if I'd heard of so-and-so, and I'd say, no. "Well, he's running for Congress also. He's trying to collect signatures." Well, to the best of my knowledge, none of those people got enough signatures. I was the only one who succeeded in doing that.

The -- one of the people that was interested in my candidacy was Mr. Beretson who is the newscaster from Fort Smith, Channel 5. He called me up and asked me, he felt that because they had other candidates on that they were obligated morally and probably by law to interview me and asked me if I would consent to an interview, and I said I'd be glad to.

I appeared on their station, I believe it was May 15th of 1992. They told me that they received a large number of favorable telephone calls in regard and comments from my [119] appearance at that time.

On July 8th, I received a letter from Mr. Bill Simmons who is the State Director of the Arkansas Associated Press Bureau, and Mr. Simmons asked me as a candidate to answer 230 questions that they were in a form, which I then proceeded to do.

* * *

[123] MR. FORBES: After I wrote my letter to Ms. Howarth, I received a letter from her saying that they had decided that they would not include me in the debate. I then made a telephone call to Washington, D.C. and I called the FCC, the Federal Communications Commission, and I told them what my grievance was, and then I requested an administrative procedure to start so that I could be allowed in the debate, and the person that I -- who answered the phone, who I believe, from knowing his voice was Mr. Gross, but he did not tell me his name.

The person that told me about the procedure, he said the procedures -- first of all, he told me not to bother. He said that it would be a waste of my time and a waste of everyone else's time, and that if I put in the grievance that by the time I went through their staff procedures and went [124] through several layers of different lawyers that would look at it, they would -- I would get a denial, but the denial would come after the debate and after the election so I'd just be wasting my time. They asked me not to do it, and I said, "Well, I believe I have a right."

So I wrote him a letter -- I may not have a copy of it but the letter, I asked him to just give me the denial to begin with so that I could then appeal and come into the courts and ask the courts for equal time. I never received anything and eventually it got down -- the debate was going to be on October 22nd, I believe, and eventually I felt I had no other recourse at law other than to file a lawsuit and a request for injunctive relief.

* * *

[127] MR. FORBES: Thank you, Your Honor.

Attending that hearing was Mr. Tom Gay of the Attorney General's Office, Senior Assistant, and representing AETN was Mr. Gene Goss, who I believe is the assistant executive director.

After the hearing and it appeared that I would not have a court order to be in the debate, I put in a immediate notice of appeal. I'm not saying that for procedure. Just so we understand why the remark was made.

Mr. Goss then asked I believe it was Mr. Gay is it possible in less than 24 hours that Mr. Forbes could get a court order from a three-judge panel and be allowed in the debate, and I believe the answer was something like well, sure, anything is possible, and then Mr. Goss seemed to not be very happy about that, and he said that if there was a court order where I had to be in the debate they would cancel the debate and would run re-runs of "St. Elsewhere" rather than broadcast a debate in which I had to be included.

After that, a reporter who I think was Joan Duffy but I'm not sure. There were a number of people there -- asked, "Did I hear you right? Did you say you would cancel the debate and run St. Elsewhere instead?"

And he said, "Yes, that's exactly right," and he was quite determined that this was so.

I felt that there was some hostility to including me [128] on the debate was my interpretation of it. The next day I went to Conway, which is the headquarters of AETN, and I went to the studio because I felt that I needed to reaffirm my right, number one, my claim to my right which I believed to be included in the debate and, secondly, I needed to again make my claim that if they won't include me in the debate I would be willing to accept what I called separate but second-class equal and they would afford me equal access or equal time and I would have my own time, separate from the other candidates. I'd be willing not because it was my first choice, but because it was my only choice, and when I arrived at the studio there was -- much to my pleasant surprise, there were a number of UCA students who were picketing and protesting and demanded that there be free speech, and they were against censorship, and I was very pleased to see that.

I went into the lobby of the studio. There were a lot of people in the media there. The -- they immediately started interviewing me. Mr. Goss came up to them and said, "This is not the purpose to give this guy publicity. We --" you know, "we have a debate going on in here. That's the news. That's what you guys should report on."

A number of these reporters made remarks to me that they were bored and sick of the debate. They were tired of covering

them. It was just a horrible part of their job, and even if they didn't like me or didn't like my views, they [129] welcomed the fact that I was a diversion, that I was some kind of not boring, gave them something interesting to do while the debate was going on, so most of the -- a large number of the press stayed out in the lobby and kept interviewing me, and Mr. Goss kept disrupting them, and in the course of that debate period I kept making my claim that I should be in the debate. I said, "Look, already time is being used up, but I feel I have a right to be included."

Then I said, you know, "If not I'm going to have to continue with the lawsuit and I have to also continue making my claim to have equal access, that even if you don't put me on the debate you have to include me sometime between now and the election and give me equal facilities," and he said, "I don't give a blankety, blank, blank what you do, and that was sort of the course of the conversation. I believe that one of the moderators at that debate was Craig Cannon who is an affiliate of the ABC stations here in Fort Smith and Fayetteville.

After it was over, okay, someone came out that was in the studio. I wasn't allowed in the studio. Someone came out from the studio and they said, "Well, Mr. Goss, I'm so glad you didn't allow Mr. Forbes in there. He would have won the debate and he would have hurt everything," and then Mr. Goss said I had to leave the area, leave the building, and I asked why. He said, "Well, you just can't be here. They're coming [130] out now."

* * *

[132] MR. MARKS: No, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit No. 13 identified and received.)

MR. FORBES: That's fine. I think he wants to put a sticker on one of these, yeah.

Earlier I mentioned my conversation with Mr. Craig Cannon. On October 15th, 1992, I was in Fayetteville, and the station he worked for, there were commercial stations. They're different from AETN which is a state agency. They had also had a debate including the Republican and the Democratic candidates for that

office, and I found out about it the day of the debate. I was not invited, and I went to the station and I asked if I could buy time around the debate and I was told I couldn't, but I was told by Mr. Pitcock, "If you come to the debate, I think I can let you in because I think it's right that you be afforded equal opportunity."

So I went to the debate. I sat quietly in the audience while I was actually attacked by both of my opponents. I -- Carolyn Long was in there. I gave Ms. Long a question and a statement saying "I'm here and I would like to be invited and have an opportunity to respond to some of these attacks and things," and the question was not passed but after the debate Mr. Cannon came up to me and he interviewed me and again he apologized because he felt that I should have been included in the debate and he had nothing to do with that [133] decision, and another reporter from a local paper, the *Washington County Observer* of October 22nd, 1992, was interviewing me after that debate, and there was a young man who worked there and he was just getting off work, and the reporter asked him, "Did you see the debate?" and he said, "Yes, I did. It was very boring."

And he said, "What do you think about the fact that they wouldn't let the other -- the independent on?" He said, well, he thought that was terrible, and by chance, this was a young black man. He said, "Well, what do you think that this guy, his opponent's called him a hater of other races and so on. Why -- do you still think he had a right?"

"Yes, he still had a right." He said, "You know this guy even talking to?" Said, "Yes." Said, "He's the guy." He said, "Oh, you're kidding me" and so we started talking again and introduced ourselves. We talked for about an hour. This story is based upon that.

The man was an 18-year old. He decided to vote because of the fact that I was excluded from the debate and he decided that he's going to be involved in the political system because he thought it was so unfair the way I was treated, and he -- one of the purposes of the debate by AETN was to enlist 18 year olds, so, Your Honor, at this time I would like to enter copies of that newspaper ad from the *Washington County Observer* of October 22nd.

* * *

[140] MR. MARKS: -- will be exceptionally confusing to the jury but in fact I can't tell what it is.

MR. FORBES: Some of them, I'll admit are --

THE COURT: I tell you what let's do. Let's let me look at them while we go on.

MR. FORBES: That's what it is, and there's more than one page basically, a different document.

MR. MARKS: It's -- is there lots of petitions --

THE COURT: Let me look at them while you go ahead and -- you go ahead and finish. And if the Court determines that they are admissible, we'll go back and let you put these in, okay? All right.

(End of bench conference.)

THE COURT: You may continue, Mr. Forbes.

MR. FORBES: I think the only -- excuse me -- I think the only thing that I need to testify to is a factual issue, is that I want to make it clear that at all times I claimed all of my rights including my right to the equal access after the reasonable equal access after the debate was over and before the election. And that would be all I think is relevant right now.

Cross Examination of Ralph P. Forbes

[144] BY MR. MARKS:

Q. I asked you, question, "Did you win or lose?" and what was your answer?

A. "Well, I believe I won, but the official thing was I lost. I'm saying the first tally was I won by two-thirds of the vote cast. By the next time they counted it I didn't have hardly any votes."

Q. All right. Thank you.

Now in 1986, you ran for the -- you ran in the Republican primary --

A. Yes, sir.

Q. -- for Lieutenant Governor?

A. That's correct.

Q. Is that correct? And you lost that election. Is that correct?

A. Well, that again was a debatable question. Officially I lost, yes, sir.

Q. All right. And I'd like to now go to 1990, which was two years before the 1992 election.

A. That's right.

[145] MR. FORBES: Yes.

MR. MARKS: I just want to -- let me -- because I think you're wandering far afield of the question.

BY MR. MARKS:

Q. Did you win or lose the 1990 Republican primary for Lieutenant Governor?

A. I believe I won because on May 29th in a three-way race, I had 53 percent of the vote.

Q. But what was the actual result?

A. After some Pulaski County reconfiguration of the figures it got down to I think 48 or 49. I forget the number, now, but it was under 50 percent, which caused a -- resulted in a runoff I believe on June 12th.

* * *

[146] Q. So you lost in that election?

A. Oh, yeah. But it wasn't an election.

Q. All right. But at least in terms of the State of Arkansas, it was --

A. In terms of the official papers, no, I did not win, and I filed the lawsuit.

Q. But, Mr. Forbes, please stay with me or we'll be here all afternoon.

A. Okay. I'm sorry. I'm sorry.

Q. And we may be all be here all afternoon in any event.

A. None of us want to do that.

Q. But the point is that you ran for the Republican primary in 1990 for Lieutenant Governor.

A. That's correct.

Q. And the official result was that you lost?

A. Oh, sure.

Q. All right. Now, Mr. Forbes, we heard from a number of the members of your family today and, of course, from you about your petition drive and about your campaign, and so now I'd like to go into the campaign. This is the part of the -- of your election where you -- you have filed your signatures and you'd already been certified as a candidate. All right.

Now, Mr. Forbes, it's true, is it not, that your campaign was very disorganized and, in fact, you yourself described it [147] as bedlam?

A. I think that would be a very accurate description.

Q. And it's also true, as I think we saw today that your wife and some of your children helped in your campaign, did they not?

A. That's correct.

Q. But really other than that, you had very few volunteers and it was a one or two main -- one or two man campaign toward the end of your campaign; isn't that correct?

A. It isn't because of the nature of the way -- yes. Yeah.

Q. A one or two man campaign. Now, Mr. Forbes, in campaigns, people have campaign headquarters, and in your campaign, your headquarters either was your home or wherever you happened to be at a particular time.

A. Some friends and supporters in Fort Smith or Fayetteville or Huntsville or Mena or wherever. That's right.

Q. Wherever you were was the headquarters?

A. That's exactly correct.

Q. You didn't have an official storefront or campaign building as a headquarters?

A. No, absolutely not.

Q. And, you know, we all know that for better or for worse, raising money is a -- is a big part of an election.

A. I think for worse, but that is true.

Q. Well, many of us might agree with you, but in any event [148] you did try to raise money, did you not?

A. Yes, I did, and I raised some.

Q. And you actually raised just under $10,000?

A. I think that's correct. It wasn't very much by politician standards. That's for sure.

Q. Now, Mr. Forbes, one of the things that happened as a result of not being able to raise much money was that you weren't able to buy nearly enough radio ads, were you?

A. In my opinion, no, obviously, and obviously by the results.

Q. And you really weren't able to buy television advertising, were you, because that's real expensive?

A. I bought some.

Q. But not nearly enough?

A. Not as much as I wanted to, no.

Q. And not really enough, right?

A. I would say by the books I've read, if you're buying television advertisement, you would have had to have spent more money than I had.

Q. And -- now you were trying very hard at this time and you're really putting your heart and soul into this campaign, weren't you?

A. Because I wanted to express my views, yes, that's correct.

Q. But I think you knew that you weren't getting nearly enough coverage from the media, from television, from radio in [149] order to attract attention; isn't that correct?

A. It's correct that after I became a certified candidate the media, which is the right of the public's media -- I'm not questioning that -- decided that the best way to handle it would be to black out everything I said or did.

Q. Well, for whatever reason --

A. Whatever reason.

Q. -- you didn't get coverage, and I think in a moment that we had, you described yourself as not even a flea scratching an elephant. Is that correct?

A. I would say that as long as the media -- in other words, the media is the key to winning elections now. I think we discussed how -- I was told that had stumping still been a viable

campaigning method, I probably would have won any election I was entered into, but because of the nature of things and America and Arkansas today the only practical means of winning any election is some sort of mass communication.

Q. And I don't want to make too much of a point of this, but I do want you to turn to page 14 of that deposition, just the next page, and if you'll look at line -- read line 6 through 8 because I really want an answer to my question here. Go ahead and read that.

A. You start at 5. Is that correct?

Q. On page -- excuse me. I'm the wrong. I'm at the wrong page. Turn to page 49. My mistake. I'm looking at too many [150] numbers here. Let me do this for you.

Page 49, start at 6, line 6. Let's see.

A. "And by that standard, whatever those standards were which I was looking up in some books at that time, I wasn't even a flea scratching an elephant."

Q. So what you were really worried about was that you simply weren't getting enough coverage from any of these media here in the Third District to win this election, correct?

A. It's absolutely correct. You have to have coverage. If you convince ten people and they're absolutely for you, it doesn't -- ten people aren't a lot in, you know, hundreds of thousands of people.

Q. Now when you were doing this campaign you really spent a lot of time on these activities where you were trying to be a successful candidate, and I mean I want you to explain, you know, there are folks I want you to talk to. But it's true, is it not, that you were told by many people that there was a general consensus that your campaign just didn't exist, wasn't getting anywhere?

A. There were even a number of people who volunteered and helped me on the petition drive that weren't even aware that I had become a certified candidate.

Q. It was that bad?

A. The censorship of me and my candidacy was that bad.

Q. And this was -- we're not talking now about censorship by [151] AETN. We're talking about -- we're not talking about

AETN's decision. We're not talking about AETN's programming. We're talking about all the newspapers –

A. That's right.

Q. – and all of the radio stations and all of the television stations here in this district, and they just were not covering you, is that correct?

A. It seemed that once I had done the newsworthy thing of making history and achieved balance status, and was a qualified legal candidate, all of the people that were free to – and I'm not questioning that. I'm saying that they have – the *Arkansas Democrat-Gazette* has the right to say anything they want about me.

Under *Sullivan* they can lie about me. I can't do a thing about it. They can do whatever they want, publish or not published. There's no question about that. The only alternative I had was AETN who was a state agency under constraints that I had to have equal time. This was the only option I had as a candidate, not backed by PACs, not backed by special interests of reaching any significant number of people.

Q. In other words, none of the other media were covering you so your only hope really in order to come up to the level of Mr. Hutchinson and Mr. Van Winkle was somehow to get on AETN?

A. I would think the practical realities of that situation [152] that was it because all other avenues of expressing my views had been barred.

Q. Now I want to go back to this comment about what people in the Third District told you because I think it's really important for the jury to hear what the people in the Third District were saying to you and the folks you spoke to really said that your campaign didn't exist and that what you were doing was not newsworthy. Didn't they say that to you?

A. Oh, no, I don't think so. If I understand what you're saying I don't think anyone told me what I was doing was not newsworthy.

A. All right. Let me ask you to turn to page 52, and I'd asked you about your efforts and whether they were successful to get on newspapers, and if you start reading at line 11 and read

through line 21, I think I'd like the jury to hear this one little session because this is your answer when you testified earlier in this case from – in your own words. So, Mr. Forbes, please start at page 52, line 11 and just read, I asked you why you didn't think in your opinion you were successful getting press coverage, and here's your answer –

A. Let me ask. Does the jury get the entire thing? Do they see everything in context?

THE COURT: You answer the questions now and then you'll get to respond – in other words, if we had a lawyer your lawyer would get to get up and then ask you questions. [153] You may respond after he's finished but answer his questions now. Okay? And then I'll let you respond in the way you wanted to afterwards.

THE WITNESS: I think starting at Line 11,

"We were just basically – well, I was told by many people that there was a general consensus that we were non-persons. We didn't exist. Our campaign didn't exist, and it was generally agreed by everyone that no matter what I did, if I ran around in a flaming war bonnet naked, jumping off towers it would be not newsworthy, and the odd part about one thing I do recall I think it's 'AsaHi' or however they pronounce it. It's the largest Japanese news media in the country, meaning Japan, kept calling me. They wanted to come down and film my campaign. I had to keep telling them I'm sorry, that there's nothing to film."

BY MR. MARKS:

Q. Now, Mr. Forbes, many candidates, certainly Mr. Hutchinson and Mr. Van Winkle, when they ran for Congress in this district, your opponents in 1992, they had reporters covering them and traveling around with them. Did you have any reporters covering you or traveling around with you?

A. Absolutely not.

Q. And we're not talking just about AETN. We're talking [154] about any of the newspapers and the television stations and the radio stations in this district or, in fact, anywhere in Arkansas.

A. That's correct.

Q. Nobody covering you.

A. That's correct.

Q. And did any reporters ever travel with you at any time during your campaign?

A. Certainly not.

Q. And would you agree then actually to use your own words, that the press coverage of your campaign was zilch?

A. Looking back, after I made that deposition, I did find a few leaks in the paper curtain but as a practical matter, it was, I believe, orchestrated to make it appear that I -- just to make me disappear down the memory hole. That's correct.

Q. But you did describe your own -- your own campaign and the press coverage of it as zilch; is that not correct?

A. Not my campaign. I would describe what the news media did as zilch.

Q. As zilch.

Now, Mr. Forbes, there are things that one can do other than getting coverage on a television station or radio station or in a campaign. For example, you can hold rallies, but you didn't hold any rallies, did you?

A. As I told you, the -- what -- if I had any hope at all of [155] winning, I had to get on the mass media.

Q. I understand that, but please --

A. All right.

Q. -- focus on my question. The fact of the matter is that regardless of media coverage, you didn't go out and hold rallies, did you?

A. No, of course not.

Q. And, in fact, you didn't speak to any large groups. I mean, you could go to a church. You could go to a -- you could go to a rotary club. You could go to some place where there were people in large numbers, maybe speak to them and generate some news that way. But in fact you didn't speak to any large groups, did you?

A. Well, I don't know what you mean by "large," but I did speak to groups, yes.

Q. Well, I'll ask you to flip to page --

A. I remember.

Q. -- to page 55.

A. Uh-huh.

Q. And take a look at lines 5, 5 through 8, and particularly look at line 8. Would you just read line 8, please?

A. Sure.

"My recollection I don't remember any large groups."

* * *

[157] Q. And you did not come to Ms. Howarth at this time and ask her either to put you on the debate or to give you a separate program where you could appear by yourself. There's nothing in here about separate programs, is there? In this letter, Forbes Exhibit 9?

A. Well, if you look at the top of the page 2 and page 3 where you kind of table them, title, it's a request for equal access to AETN. Although at the time, I certainly thought I was entitled to be in the debate and I thought that anything [158] less would be really a violation of the 14th Amendment.

Q. Well, 14th Amendment is pretty complicated and I'm not going to try to get into that with you.

A. Well, violation of equal rights.

Q. Getting to the jury -- into that with the jury here. But it does indeed at the top of page 2 and 3 say your request for equal access to AETN.

Now when you talk about equal access, I want to go back to that second paragraph, ladies and gentlemen of the jury, on the first page, where it says, "I am respectfully requesting that I be included on equal terms with my two opponents in this debate."

A. That's correct.

Q. So I want you to focus on the question which is you wanted to appear on the same stage with these two people who were doing much better in the race than you were, correct?

A. Well, let's go back. This is August 24th.

Q. Hang on for just a second, Mr. Forbes. I want you to please, please answer my question. This letter requests that you appear on the same debate --

A. That's right.

Q. -- as these other two candidates, correct?

A. Yes, that's correct.

Q. All right. Now Ms. Howarth told you that she was not going to grant your request.

[159] A. She wrote me a letter.

Q. She wrote you a letter. And as you testified you then called a gentleman at the FCC. And it's true, is it not, that you asked this gentleman at the Federal Communications Commission in Washington, D.C. whether or not the FCC would force Ms. Howarth to let you on to this debate. They would order her from Washington to include you in the debate. That's what you wanted the Federal Communications Commission to do, correct?

A. I wanted her to obey the law. I wanted the FTC to enforce the law. That's correct.

Q. And what you wanted the Federal Government, the Federal Communications Commission to do was order her to include you in the debate, correct? It's a simple question.

A. That's what it in effect would boil down to.

Q. They would order her to -- to include you in the debate, but in fact, the gentleman at the FCC with whom you spoke said that under the law she had a right to include in the debate whomever she wanted so that they would not order her to include you in the debate with Mr. Van Winkle and Mr. Hutchinson?

A. Not under the law. Under their interpretation of policy.

Q. In any event, under their interpretation, under the Federal Communications Commission interpretation, you were not entitled to be on this debate unless you were invited, and so [160] they said over the phone to you that they would not order her to include you in the debate. Is that not what they told you?

A. I don't know about the freeze unless I was invited. They just said that they did not enforce 42 U.S.C. 315 the way it had been enforced since 1927 any longer.

Q. They refused to order that you be included in the debate. Is that correct?

A. That's correct. Well, excuse me. They told me they would refuse. They did -- really took no action.

Q. Because you didn't ask them to take action?

A. I did ask them to take action, yes, sir.

Q. And then they said that if you wanted them to really take action you should put it in writing, correct?

A. They claimed they sent me some forms. By the time -- well, I'm saying --

Q. I'm just asking about what they said over the phone.

A. Oh, on the phone.

Q. Yeah. They said if you wanted to make a complaint to put it in writing?

A. Possibly. I think so. I think that's correct. I don't remember but it must have been.

Q. Now when you called this fellow at the FCC and he told you that he wasn't going to force Ms. Howarth to let you on this debate, did you then say to him, "Well, I want you to force her to give me a separate program all by myself if I can't get [161] on the debate"? You didn't say that to Mr. Gross, did you?

A. I'm not sure, but I thought, you know, that was an alternative, and we hadn't crossed that bridge yet, so I don't know whether --

Q. So you did not ask Mr. Gross at the FCC to order Ms. Howarth to give you some separate time, did you?

A. Not in any way that would waive my claim to the equal.

Q. In fact, you didn't ask at all, did you, for that -- for the separate --

A. I don't remember exactly what I said, but that would have only been a secondary option, after that October 22nd date.

Q. And that was because your focus was on the debate?

A. Absolutely. I had a right to be there --

Q. You thought you had a right to be there --

A. I know I had a right.

Q. -- and your focus was on the debate, correct?

A. I knew then and I believe I have now.

Q. Okay. So I just want to get an answer because we've gone around this mulberry bush a couple of times, but I want to be sure the jury understands, you do not recall asking Mr. Gross if you could get a separate program because you wanted to be on the debate, so you do not recall asking Mr. Gross to give you a separate program?

A. Not at that time because my claim was for exactly what it says there.

[162] Q. All right. Now --

THE COURT: I want to break for about 15 minutes, if this is a good time.

MR. MARKS: your Honor, it's always a good time for a break, I think.

THE COURT: As good a time as any, all right. We're going to be in recess for 15 minutes, ladies and gentleman. Don't discuss the case with anyone, even each other. We'll be in recess 15 minutes.

(Recess.)

AFTER RECESS

THE COURT: You may continue, sir.
MR. MARKS: Thank you, Your Honor.

BY MR. MARKS:

Q. Mr. Forbes, you're going through all this campaigning and the press wasn't paying any attention to you. And so you knew that you really needed a miracle in order for you to make any headway in this campaign, didn't you?

A. You're talking now about the time of the debate?

Q. About the time of the debate. You knew you needed a miracle.

A. That's very much true, I think, other than if I were excluded and the people had their chance to hear my views, obviously what reason would anyone have to vote for me?

Q. So that miracle that you were hoping for was to get on the [163] debate on AETN, was that not correct?

A. And following that, the equal access time.

Q. Let's turn to that equal access time for just a moment just simply because you brought it up. You were there the night of the debate. Mr. Hutchinson and Mr. Van Winkle were in the studio debating. You met Mr. Goss and he said some things to you and you said some things to him that you have already testified to.

And one of the things you testified to is that you asked Mr. Goss for what you described as equal time which was a chance to get on the air separately if you couldn't get on the debate; is that right?

A. That's correct.

Q. Now we're here out in the lobby and there are a number of people there; is that right? Students and so forth? Other people in the lobby?

A. Coming and going. Coming and going.

Q. Is it possible that in all of this that Mr. Goss didn't understand that you were making a request for equal opportunity that he might -- that he just wasn't on the same wave length with you?

A. Anything is possible and I can't read someone's mind.

Q. Right. Let me ask you, though, to look at page 75 of your transcript there because when you testified earlier you gave a particular answer that I really want the jury to hear. And I [164] think maybe it's best to start at line 10 and read through line 20, and I'll let you read my question to you --

A. Okay.

Q. -- and your -- and your answer.

The question starts, "When you and Mr. Goss were talking back at the studio the night of the debate, is it possible that he could have thought you were talking about getting on the debate or winning the lawsuit about the debate rather than seeking additional time?" and your answer was?

A. "That is possible."

Q. Keep going.

A. "I got the impression that he had me pretty well tuned out. So we may not have been on the same wave length. That is correct."

Q. And would you just read the next question and answer, please?

A. "In other words, he may not have understood that you were requesting additional time outside the debate."

"I have no idea what he understood."

Q. Fine. Now that was the night of the debate, and I know we're talking about some complicated facts here, folks, but I want to go back in time to when you wrote to Ms. Howarth, and that's Forbes' Exhibit 9 that you've all looked at, the letter of August 24th, when you wrote to her and asked her to be on the debate, and then a few weeks later she wrote you and said [165] no.

It's true, isn't it, that when you got her letter saying no, you were very disappointed?

A. At that time I probably – varied, because at that time the debate, I didn't realize in the context of the little thing that it would be – that I was going to have such a blackout through the rest of the media.

Q. But you sure weren't happy about not getting on the debate?

A. No, I never had to when my rights were violated.

Q. Okay. Now did you know at the time that you filed the lawsuit what Ms. Howarth did to make her decision?

A. Other than she wrote me a letter as I told you in this deposition, I have no way of knowing.

Q. Right. You had no way of knowing what facts she looked at or what investigations she did or any of the background of her decision?

A. No, it would be totally irrelevant whatever she did.

Q. And you certainly didn't know whether any political pressure from the State of Arkansas had been applied to Ms. Howarth, did you?

A. To quote Ms. Howarth, you'd have to be naive not to suspect that it might be, but I had no way of knowing.

Q. You had no way of knowing. And you certainly didn't know for sure that there was any political pressure applied, did [166] you?

A. I am certain that if there were there'd be very -- little ways of knowing for sure from anyone.

Q. But you didn't --

A. Oh, no.

Q. You yourself did not know --

A. No.

Q. -- did you, sir?

A. No.

Q. Now, Mr. Forbes, did you know in fact whether there was anything out of the ordinary or irregular about the way Ms. Howarth made her decision? In other words, did you know yourself of your own knowledge that there was anything odd about how this decision was made other than the fact that you got a letter that said you weren't going to be invited?

Let me rephrase the question because you seem to be stumbling.

You didn't know that there was -- you got a letter and the letter said, "We are not inviting you in the debate," but you didn't know that there was anything what we would say in normal language, you didn't think there was anything funny about the process that she went through, and you didn't think there was anything wrong or improper about the process. In fact, you didn't know anything about how she arrived at her decision, did you?

[167] A. The process would be irrelevant because the result was a violation of my rights and that's the way I would look at it.

Q. So you were focusing on the result, and you were very unhappy with that?

A. Like I said at the time, if anybody has a right violated I'm not happy.

Q. All right.

MR. MARKS: Your Honor, if you'll give me just a moment.

THE COURT: Sure.

MR. MARKS: Yes, I do have one other question and I just want to check with my colleague for a minute to see if they have anything, but, Mr. Forbes, we saw your letter, which is Forbes' Exhibit 9 to Ms. Howarth, and that's where you asked to be on the debate.

BY MR. MARKS:

Q. Did you ever send her another letter which said, "If I'm not going to be on the debate I want an additional program all to my own so that I can explain my views to the voters"?

A. No, I did not think it was necessary.

* * *

Redirect Examination of Ralph P. Forbes

[168] MR. FORBES: One thing I do recall is at the time of August 24th, at that time, neither one of my opponents was getting any publicity. I was getting a lot of publicity, especially up until that time, and I was getting calls from the news media and calls from political consultants especially out of the Little Rock area saying, "Wow, this is amazing. You know, two years ago you had one percent in the polls, one percent of the people would admit they were going to vote in for you and the election night you get 53 percent of the state vote, and now in the polls you aren't even in the election area yet and it's before Labor Day and some polls have you as 18 percent of the people in the Third District say they're going to vote for you, and other polls say that 36 percent are going to vote for you," so in that time frame I was the candidate to be beat by the polls, and also the information that the news media was telling me from the polls that they were using, and I might mention there's two kinds of polls. There are polls that are the working polls that they don't give out to the media that's their polls. That's how they decide what they're going to do, and the other polls are the ones that they do in a different way that they hand out, that [169] are the press releases and they're kind of the spin that people want to put on things.

So the real polls were showing that in a three-way race, I was very likely to be elected, and this was in August and September before -- in that time frame when that letter was written.

And the other thing that was very interesting to me which I thought also enhanced my chances was the fact that -- excuse me -- the polls indicated, for example, the Democrat polls indicated that the people weren't so hot in favor of Mr. Van Winkle. They more didn't like Mr. Hutchinson and vice-versa. The people that are going to vote Republican were not really that enthralled with Mr. Hutchinson. They wanted to vote against Van Winkle, so in terms of the way the pollsters were examining their data, both candidates were quite soft and they didn't have hard-core support. Their support was based upon the negatives of the other one, so everybody was quite excited about what my prospects were so at that time I thought "I'm going to get a real free ride on this what they call earned publicity."

Earned publicity means when they do stories about you because you do something newsworthy as opposed to buying ads. I felt that I was a candidate of the people because I had 90 percent of the people. I can't imagine a better poll not calling a few hundred people and saying, "Now I know what the [170] entire State of Arkansas or the entire United States of America is going to do" based on what they call scientific data. I was actually taught day after day, not every day but the days when I had the opportunity, I went out to all 16 counties of the Third District, and 90 percent of the people indicated they would either vote for me or certainly would give me a chance if I could make my case.

And I felt very good about my chances. I felt very good about the news media and, in fact, just before Labor Day, one of the news media down in Channel 4 in Little Rock called me because they thought it was very newsworthy. They had heard that I was going to be running ads which we call pro-life ads showing the fact what they call a fetus is actually a little baby, and showing that this is a human -- it's not a product of conception. This is a human being that is killed in what they call an abortion, and I said yes, and so they did an interview and they had a lot of play in Little Rock. Surprisingly -- the Third District is not in Little Rock. I did get some coverage in Little Rock. I had a lot

of coverage in Little Rock based on the fact that I was blacked out in the Third District.

But before this blackout occurred, Channel 5, Mr. Buretts, and, again, because of one of the -- the Amendment 68 lawsuit. I had filed a lawsuit which stopped the State of Arkansas from using public taxpayers' money for paying for [171] abortions, and because of that lawsuit, they called me in, I believe it was in September 15th or 19th, in that period, and I did an interview on a call-in show.

They thought my candidacy, and this was a bona fide news event because it had to do with -- it's creating news. And yet they still felt they should invite the other candidates to give them equal time out of fairness. So at the time I wrote the letter to Ms. Howarth I had every reason and every expectation to believe that the AETN debate would be just a little blip on the radar screen

It is true that by the time of the debate, October 22nd, the only hope I had of getting my message across any significant number of people was that debate or at second, what they call separate but equal having some time to myself and trying to do with that poster and with the other script trying to make my point, the views that I wanted to get across that people would look at and pay attention to and make it in an interesting way.

So it is true that my -- any hopes I had to express my views by the end of October 1992, resided in the fact that AETN would obey the law. They admit that they should have given me equal time after the debate, but they didn't.

* * *

[172] THE WITNESS: I really can't remember which points we got to here, and I will say in regard to the Japanese television, the reason I told them there was nothing there to sell, okay, like the other times when I was in campaigns, I received mail boxes full of invitations, and they were like stumps speaking where you went out and spoke to people, and I loved to do it and it was -- after I got into it. It wasn't easy at first, but once I got into it, I found that people liked what I said and I looked forward to expressing my views.

Then when this campaign happened, not only -- the only two invitations I received, the only two I received -- [173] one, I asked for myself because I found out about it. We kept trying to find out where -- for whatever reason, I don't know the reason, but the people that were inviting my two opponents were not inviting me. I have no way of knowing why. It's just a fact, and we kept trying to find out where they were going but we always -- it was too late to -- to meet them or become part of that.

And the only two invitations that I had were, one, I had an invitation to speak, I think at a college here in Fort Smith, the day of the hearing with Judge Arnold, and the only other invitation I had was to speak up in Rogers, I believe, and it was the night of October 22nd, the night of the debate when I chose to be in Conway to claim my right to be in the debate and to ask for equal time if I weren't in the debate.

* * *

[173] THE COURT: Anything further, sir?

THE WITNESS: I did ask for equal time. I knew what I meant. I did everything that was required of me and if I understand it, now I don't think it's testimony, I think what I'm going to say now would be an argument so I'll stop here.

* * *

Direct Examination of Susan Howarth

[183] BY MR. MARKS:

Q. Now, Ms. Howarth, this is what's been marked for identification as AETN Exhibit No. 3, and it's entitled "Organizational Structure of AETC and AETN as of October 1992."

A. Uh-huh.

Q. First of all, let me get you to explain why in the world the Governor, Bill Clinton, is listed up there in the first place?

A. Well, the Governor of the State of Arkansas appoints the eight members of the Arkansas ETV commission to eight year terms, staggered eight year terms, and they are the body to which the FCC licenses the AETN's five transmitters.

Q. So it is these folks, the eight members of the Arkansas ETV commission as a commission who are the licensee, the actual licensee from the Federal Communication Commission?

A. That's correct.

Q. All right. Now will you tell me what the AETC, the [184] Arkansas Educational Television Commission is?

A. Well, again, it's the governing board for AETN and it's comprised of eight individuals, again who serve eight year terms. They are the board that's established to set the broad policy by which AETN operates, and they hire me or hire an executive director to manage the network and to facilitate their policies.

Q. All right. Now they make policies. Let's go down to the next level where your name appears as executive director. Would you please explain what the executive director is and what you do, please?

A. Well, as executive director of AETN, I am in charge of the network and the network operations, and the AETN network foundation. That is a support body that receives private contributions that help make programs possible, receive the pledges and all.

I'm in charge of the facility in Conway and the facilities throughout the state. I interpret the policies of the commission and interpret those to the staff who works for me. There are approximately 100 AETN staff.

Q. And what is your responsibility in terms of making decisions that affect the viewers when it comes to making journalistic decisions or programming decisions?

A. I'm the one who ultimately makes those decisions. I've been referred to as the editor-in-chief, the person who, you [185] know, makes the final decisions. I do consider the recommendations of my professional staff about those decisions. Some -- there are obviously hundreds of those things that happen on a daily basis and some I'm involved with more intimately than others but that's my job.

Q. All right. The next level down here shows the name of Larry Foley, Associate Director. Now in 1992 in October what was Larry Foley's job?

A. He's the associate director at AETN, the number two position. That was the position I had originally held when I came to AETN. He is responsible in more of the day-to-day operation of the network.

Q. The next line down and the next name that appears on the chart is Carole Adornetto. She is listed as the production director or shown on the chart as the production director. What was her job?

A. She was one of the seven division heads at AETN, is one of the seven division heads at AETN responsible for the production of the programs, the local programs that we do serve the Arkansas audience.

Q. And then down at the bottom of the chart is the name Amy Oliver. I earlier described her as Lois Lane, but it says something different here. Would you explain as of October 1992, what Amy Oliver's job was and -- in this organization?

A. Well, she worked for Carole Adornetto. She's -- and Amy [186] was the production manager and the executive producer and producer of a number of different programs at AETN.

Q. Now under Amy's name on this chart, I'm sure the jury has noticed that it says that she was an employee of the AETN foundation. What is the AETN foundation?

A. The AETN foundation is a non-profit entity that receives private contributions to support the network. Close to 35 to 40 percent of our funding comes from private sources, and the foundation receives those funds and employs a number of people in addition to the people who are employed through state funding and federal funding. And did Amy work as a staff member of the Arkansas Educational Television Network even though she was paid separately through private money?

A. Yes, all the employees are really employees of AETN. That's the way it works on a day-to-day basis.

Q. All right. I'm now going to ask you to look at something that's already been marked, Your Honor, as -- excuse

me -- as AETN's Exhibit 4, and mercifully I don't have a chart for this, or at least I don't have a chart for the whole thing.

Would you look at AETN's Exhibit 4 and after you've identified it we'll pass it along to the jury so that they can look at it, too. What is it?

A. It's the AETN's programming policy statement.

Q. And do you recall when it was adopted?

[187] A. In 1988, I believe the summer of 1988, it was adopted by the Arkansas Educational Television Commission.

Q. In other words, it was adopted by these eight folks up here?

A. That's right.

Q. And why did they adopt this policy statement? What's the purpose of it?

A. Well, again, their role is to set policy, and by adopting this particular statement they set forth the broad policy that they wanted AETN to operate by. It provides the structure, if you will, for the staff to use as we make daily decisions about programs, and it was set up in a way so that it could be a heat shield for AETN so that it would show that we were not subject to any kind of political pressure in our program decision making. That's very important for us.

Q. Now you used the term "heat shield."

A. Uh-huh.

Q. Where does the heat come from and what does the shield do, and I realize that's a compound questions, Your Honor, so I'll ask it in two parts.

A. Uh-huh.

Q. First, where may the heat come from?

A. Well, the heat may come from any number of sources. Being a state agency it can come from, of course, political sources. Since we receive our funding from a variety of sources, it can [188] come from any number of our funders, whether they be private or government funders. I say it may come from any of those places. Generally we don't receive very much in the way of political pressure or funding pressure.

Q. And when you talk about a shield, how does this policy assist the eight members of the Arkansas ETV commission in functioning as a shield?

A. Well, again, I think any time you adopt a policy and you have it in writing, you can hold it up and say, "We adhere to these guidelines." This shows that the – that we don't give in to political pressure, that we do make our decisions independently and that's why it's important. It's important to have those kinds of policies in writing.

Q. Ms. Howarth, who has the responsibility for making that policy work in real life day to day?

A. My staff and I have the responsibility for interpreting it and making it work.

Q. All right.

MR. MARKS: Your Honor, I'd like to take this chart down and put up another chart which has an excerpt from that policy.

BY MR. MARKS:

Q. And, Ms. Howarth, I'm going to show you a somewhat smaller version of what's been identified as AETN's Exhibit 5. And I know the jury can read it, but it's short, and I'm going to ask [189] you to read it aloud.

A. "AETN maintains public trust in its editorial integrity by shielding the program in process from improper political pressure or influence from program funders or other sources."

Q. Now we've already talked about where the political pressure may come from. But could you just explain to the jury what you conceive the term "public trust" and the term "editorial integrity" to mean? What do those mean to you? Address that.

A. Well, it's very important for AETN to maintain the public trust, for the public to have confidence in the program decisions that we make at AETN. They need to be able to believe us, to be able to know that when they tune into a program on AETN that it's free from political pressure, that no one forced us

into airing a particular program or choosing particular individuals to be on.

If they suspected that we had that kind of political pressure or we wouldn't have this very important trust with the viewers, and they would just doubt -- they would doubt us and it would probably cause them to not watch us and not support us.

Q. Now, Ms. Howarth, I'm going to ask this question in sort of a -- I don't know, maybe a provocative way, but why do you care, why does AETC care what the viewers think? Why is that [190] important to you?

A. Well, it's important for a number of reasons. Number one, I probably would never have gotten involved in public television and be working in this business if I couldn't be involved in an operation that was -- that had the confidence of the viewers, that could produce programs that they really could trust, that they understood we were doing for all the right reasons, all the fair and right reasons, so it's important to me to maintain the public trust for that reason.

Personally, and I think it's important for a lot of our staff for the same kinds of reasons.

Q. I'm going to give you now what's been marked as AETN's Exhibit 6, and I'm going to switch charts here again, Your Honor, and we'll see if we can move this along just a little more quickly because these statements are rather short, but I would like Ms. Howarth to have an opportunity to explain this statement to the jury.

Would you read it aloud, please, Ms. Howarth?

A. Yes.

> "AETN bases its public service programming on its value in the marketplace of ideas, not on financial considerations or commercial pressures."

Q. All right. Now this is from this 1988 policy statement. I want you to explain for the jury what is meant by "the marketplace of ideas" in your understanding, because you're [191] the one who's responsible for making this policy work.

A. Uh-huh.

Q. What is the marketplace of ideas?

A. Well, to me, this is what differentiates public television from commercial television, and that's that we put the viewers first, that it's our responsibility to value a program by how the viewers see it, by the value that they place in the program, not in the value that a commercial sponsor might place in it, so, again, it's what differentiates us from commercial television and we don't consider the financial pressures when we make those program decisions. Instead we consider our viewers first.

Q. And then I'm going to show you what's been marked for identification as AETN's Exhibit 7, and put this board up on the easel. Again, from the same 1988 policy statement on programming, might as well read this, too. It's short.

A. Okay.

> "Locally produced programs relevant and responsive to Arkansas needs, problems, issues and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state."

Q. All right. Now let me start at the bottom this time and talk about the term "tailored to the interests of the people of this state."

[192] Ms. Howarth, what responsibility -- explain to the jury, please, what responsibility that puts on you as the editor in chief at AETN?

A. Well, we need to consider what the people of Arkansas, what the viewers want, when we make our program decisions. We don't just take a schedule from PBS, from the network, and broadcast it. We have to really consider if it's something that the people in Arkansas are interested in, and in addition to that we produce local programs that will kind of fill out the schedule, if you will, and meet the needs of our Arkansas viewers.

It's something that we do that's very similar to what a newspaper editor does. They have to decide what their readers want to read and we have to decide what our viewers want to view.

There are certain constraints that we have. Again, we broadcast generally only 18 hours a day and we have to make decisions. There's financial considerations obviously. We don't

have the budget to buy all the programs we want to buy or produce all the local programs we want to produce, and we have to make tough decisions in order to tailor that schedule, the schedule that we present within the constraints, the financial constraints that we have and the time constraints, the very real time constraints.

Q. Okay. Great.

[193] I'm going to take this down, but at the same time I'm going to ask you to look at what's been marked as AETN's Exhibit 8, and we'll make sure that the jury gets all of these later. I wouldn't want you not to have enough paper.

What is Exhibit 8?

A. It's the statement of principles of editorial integrity in public broadcasting.

Q. That's fairly high sounding. What is this and -- well, let's identify it first. What is it?

A. It's a document that was developed in the mid-1980's by a group of public broadcasters who were licensed to states as AETN is and others who were licensed to universities; therefore, licensed to some kind of Government entity, and those public television stations got together and developed this set of principles in order to protect them from political pressures.

Q. Now why was that a concern of public television stations that were licensed to states, for state universities? I mean, why didn't every public television station participate?

A. Well, some public television stations are licensed to local community boards and receive no direct funding, for instance, from the state, and so they had -- had not had any experiences where they had had that kind of pressure, that some in public broadcasting who were licensed to states had had.

[194] Q. Now what kind of -- when you say "that kind of pressure," what kind of pressure are you talking about?

A. Well, I mean, just for example, oh, I don't know, a governor's office could call and say "We want you to do a show on this," and the station would feel compelled to do it because so much of their funding was coming from the State of Arkansas, for instance, or the State of Alabama, or the State of Mississippi.

Q. And who from Arkansas participated in drafting and developing this statement of editorial principles?

A. Well, it was before I came to AETN, and our previous executive director participated and at least one member of the commission participated in the drafting of this.

Q. Now I'm going to show you what's been marked as AETN's Exhibit 9. And I'm going to put that chart up here as well, Your Honor.

This is an excerpt actually from page 14 of the statement of principles of editorial integrity. Now I notice this was adopted June 7, 1988. Was this adopted at the same time as the programming policy statement we've been looking at?

A. Yes, the commission adopted both papers, both documents at the same time, the same meeting.

Q. All right. And, of course, this is four years before 19 -- the 1992 election, but in any event, would you read this short snippet from page 14 of the statement?

[195] A. The process of developing programs must be managed by the professional staff according to generally accepted broadcasting industry standards so that the programming service is free from pressure from political or financial supporters.

Q. Now in connection with the 1992 debate that Mr. Forbes wanted to begin on and where he was not invited, who is the professional staff who developed the format for the debate and made recommendations to you about the details of it?

A. Well, on the organizational chart, Carole Adornetto and Amy Oliver were the two principal people who worked on a plan for the debate, and then presented them to me.

Q. And who, if anyone, did they consult with in doing that?

A. They worked with Bill Simmons of the Associated Press, the Arkansas Bureau Chief for the Associated Press, who was a consultant, and they talked with him about what the format of the debate should be and they talked with him about who to invite, what panelists to have on, what reporters to include.

Q. Now when you look at this at this particular statement, what did Bill Simmons add to what your staff was -- your staff, the AETN people, Amy Oliver here -- to what she was already doing?

A. Well, again, I had every confidence in my staff that they would adhere to the generally accepted broadcasting industry standards that we're talking about here, the journalistic [196] principles and all, but I believe that you can never be -- have too many heads, I suppose, too many professional heads involved in something like this and that he brought so much credibility.

We had worked with him in previous campaigns. I think in the 1990 campaign he worked with us on some debates and he had brought a lot to the process because of his -- his background and his experience.

Q. Great.

A. Uh-huh.

MR. MARKS: Your Honor, the last poster board.
THE COURT: Okay.

BY MR. MARKS:

Q. Now, Ms. Howarth, I put up here what's been marked as AETN's Exhibit 10, which is another piece from the policy that you've been testifying about, and would you read it and then explain its importance as it relates to this debate here that Mr. Forbes wanted to get invited to?

A. "The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria such as fairness, objectivity, balance and community needs, not on funding considerations."

This meant to me, as the station's chief executive officer, that it was my responsibility to assure that the [197] debates, as we presented them, were fair and were not biased, were objective, were balanced. It was my responsibility to make sure that they adhere to the highest journalistic standards.

Q. Now I'm going to show you again a letter that you've already seen. It's AETN's Exhibit 11 but the jury is privileged already to have it as Mr. Forbes' Exhibit No. 9. We'll try not to have too many duplicates here but it's just easier for me to show this to you.

Now this is the letter that Mr. Forbes wrote to you, and he promoted you to president, probably because he didn't have the benefit of all these charts, but he wrote to you at AETN on February 24th and, as he has already testified, he asked to be included. I think the phrase is "on equal terms with my two opponents in this debate." Now this is August 24, when you received that letter what did you do?

A. Well, I called together our staff, Amy Oliver in particular, and Carole Adornetto, and we reviewed what we had done in terms of our planning for the debates up until that point in time, and obviously they had been planned for several months at that point.

Q. Let me stop you here because they obviously had been planned for several months at that point. Did you know about Mr. Forbes before you got this letter? Do you recall?

A. I remember a discussion that he was -- that the staff [198] thought he was likely to be a candidate, that he was trying to get enough signatures and that we had made a determination at that point in time, Amy had done some research, checked out what kind of press coverage he was getting, what kind of popular support he had from the district, and she consulted with Bill Simmons and with others, and recommended earlier on that we not invite him to participate in the debate. And then, we received this letter.

Q. Now, so even before you got this letter you knew about Mr. Forbes. Now why had you, why had you accepted Amy Oliver's recommendation, before you got this letter, not to invite him to the debates, even before the letter arrived?

A. Well, number one, the debates were designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for their benefit. And the recommendation that Amy made to me was that the viewers would best be benefitted by a debate between the candidates who had a reasonable chance to win the election, and actually, up until, I don't remember the exact date when Mr. Forbes qualified as a candidate, but during that time, before he was a qualified candidate -- you know, again we had some of these discussions, what if.

But, until he was a qualified candidate, of course, we did not invite him to participate in the debate. When he became a qualified candidate we determined again that the [199] viewers would best be served by limiting the debate to the two people who had a reasonable chance to win. She presented evidence -- evidence. She had done some research where she said that in his last election he had received very few votes, had not received much popular support. He had raised very few dollars and hadn't filed any paperwork with the Federal Election Commission, the Secretary of State's office.

Q. Now, now let me just stop you here.

A. I'm sorry, okay.

Q. In terms of filing paperwork with the Federal Election Commission, what does that mean? Please explain, explain that to the jury.

A. Well, it's my understanding that candidates are required to disclose, or to file statements, noting how much money they have raised for their campaign, how much as been contributed. And I think we have heard some of that earlier on about how much Mr. Forbes raised compared to some of his -- to the other candidates in that race. So, for us, it was important to know that because it indicated how much popular support he had. So that was one of the things that Amy reported to me when we had this discussion.

She also talked about the fact that Mr. Forbes didn't really have any kind of formal campaign headquarters except for his house. It appeared that he had no paid staff and very few volunteers working for him, other than, you know, some [200] family. And then, it also was, she said that she had checked with some journalists throughout the state and reported to me that no one was taking, considering Mr. Forbes a serious candidate. They did not think he had a chance to win the election and they weren't even going to -- they weren't even planning to report his name on election night in the results.

Q. Let me focus on the term "serious candidate."

Would you explain to the jury what you mean by the term "serious candidate" because I think we have all seen Mr. Forbes and we obviously all think he is a serious gentlemen.

A. For us it meant that he didn't have a serious chance to win the election, that he didn't have serious support among the constituents, the voters, in the Third Congressional District. He didn't have popular support and didn't have a chance to win the election.

Q. Now, when you are considering putting this debate together for the viewers and you are trying to consider what's best for the viewers, why does it matter whether or not Mr. Forbes had been able to generate popular support? Why is it important?

A. Well, for us, the debate was only going to be an hour, and after you subtract out the opening introductions and the closing credits and all, it was going to be about 50-53 minutes of debate time. And, as I said before, our broadcast time is a very valuable commodity, very, very valuable. We don't have a whole lot of it, we don't have a whole lot of [201] money to devote, resources to production of local programs.

So, if you take 50-53 minutes and divide it in half then we were able, then we would have been able to, as we did, give each of the two candidates who had a serious chance to win the election 25 minutes or more to debate the issues. If we divided it three ways then the candidates would have received substantially less time to discuss the issues. And, for us, it didn't seem appropriate, it didn't seem like it was the right thing to do, to take someone who had such a small percentage of support and give him equal status in this debate and an equal amount of time. We were trying to reflect what the viewers and the voters were telling us in the information that we had received.

Q. Okay. you had already made this decision and then this letter comes in from Mr. Forbes dated, it's dated August 24th, and he asks "that I be included on equal terms with my two opponents in this debate."

A. Uh-huh.

Q. What did you do?

A. Well, again, as I remember it, I, we called together another meeting, or we had several discussions about this, and I asked Amy to please look into this again and to find out what was the current -- what's the current status of Mr. Forbes' campaign; has he gained any ground since we last looked into this?

[202] And she came back to me with a report that basically said nothing's changed. That he still doesn't have a campaign headquarters, still isn't raising money, still does not seem to have any popular support in the district other than the 2,000 signatures that he was able to get to qualify as a candidate. And, she talked again to journalists, she called around again and reported to me that again nothing had changed from anyone else's point of view either. So she recommended that, at that point, we not include --

Q. Let me just stop you.

A. Okay, sure.

Q. When you say "nothing had changed from anyone else's point of view either" --

A. Uh-huh.

Q. -- would you just explain that to the jury a little bit more in detail. I mean what was the conclusion that you drew from all this?

A. Well, again in the same way that I asked Amy, you know does Mr. Forbes have any support in the Third Congressional District, she asked people who cover politics in the state what their perception was, and what the facts were and they said, "No, Mr. Forbes still --" his campaign wasn't catching fire, there was no growth and support. There was nothing to justify us giving him equal time within the context of the debate.

[203] Q. Okay. Now, Ms. Howarth, I'm going to divert here from Mr. Forbes' letter, because you just used a term "equal time." I would like you to explain to the jury something that is in addition to equal time, something called reasonable access for federal candidates.

A. Uh-huh.

Q. And I'm going to ask you to tell the Court and the jury that this is Section 3129(a)(7) of the Communications Act of 1934, although that's where it comes from, I would like you to explain what you understood and what you understand the term "reasonable access for federal candidates" to mean.

A. Well, candidates for federal office, and that would include for the U.S. House of Representatives, for the Senate, for the Presidency, all can ask a television station, public station or a commercial station, for time and the station is obligated to give

that time. It's something that is important and it's a legal requirement and it's something that we were well aware of at AETN. As a matter of fact, during the 1992 election there was a candidate for president, a minor party candidate for president, who asked for access time and we provided it to them, I think we gave them 15 minutes, they had a pre-produced program, and we aired it I think at 10:00 one night during the campaign for President.

Q. Now what would you have done if Mr. Forbes, instead of asking to be included in the debate, what would you have done [204] if Mr. Forbes had just said, "I want my own half-hour, I want reasonable access"?

A. We would have given it to him. That, to be honest, that's been the thing that surprised me about this, because even in my letter to Mr. Forbes advising him that we were not inviting him to the debate, I gave him the number of the FCC and I fully expected him, or them to counsel him that he had -- if he wasn't aware, that he had the right to reasonable access time. And I thought that probably the debate was his number one priority but I fully expected that once he did not gain access to the debate that he would ask for access time and that we would give it to him.

Q. Were you listening for a request or anticipating a request from Mr. Forbes for reasonable access?

A. Absolutely. I really thought that was the next step. That when he was not on the debate that he would ask for access time, and my staff was fully aware that, to be on the alert. I wasn't there that evening so, you know, I can't say whether Mr. Forbes tried to ask for time or not but since he had written to us before I fully expected we would get a letter or get some kind of a request or if he asked for it that my staff would have reported it to me.

Q. Now you say that your staff was fully alert.

A. Uh-huh.

Q. Why were they fully alert for a reasonable access request?

[205] A. Well, again, Mr. Forbes had been so intent upon getting into the debate, I knew that it was his right and I advised him of this. We had a discussion about it. The programming people even knew to think about where there might be a time slot

between the 22nd and the election. We were prepared because we just -- we thought it was the logical thing for Mr. Forbes to do.

Q. Let me just be sure that the jury understands this. If Mr. Forbes, if instead of asking to be in the debate, or in addition to asking to be in the debate, if he had said, "I want my own separate program," what would you have done?

A. We would have given it to him.

Q. Right away?

A. Absolutely.

Q. All right. Now Ms. Howarth, I am going to show you what's been marked as AETN's Exhibit 12 for identification, and ask you to identify it, please. What is this?

A. This is the letter that I wrote to Mr. Forbes in response to his letter requesting time on the debate.

Q. Now, what did you tell Mr. Forbes?

A. Specifically:

> "AETN has made a bona fide journalistic judgment that our viewers would best be served by limiting the debate to elected nominees of the two major parties."

And then I went on to tell him how to get in contact with the [206] FCC if he had any kind of a -- let's see,

> "that you should feel free to contact the Fairness Political Programming Branch of the Enforcement Division, Federal Communications Commission, if you want to pursue an administrative appeal."

Q. Now why did you put that business about the FCC in there?

A. I thought it was the forthcoming thing to do. I wanted Mr. Forbes to -- we wanted to try to be fair as we did this. I mean, we took this whole debate and the whole, our coverage of the election, very seriously. We wanted to do the right thing. We checked with our legal counsel in Washington with your colleague, Mr. Gray, to confirm our understanding of the rules regarding political broadcasts.

Q. And what conclusion did you draw from that about whether the FCC would require you to include Mr. Forbes in the debate?

A. Mr. Gray confirmed our -- my understanding, which was that it was our decision to make. It was our decision about who to invite to the debate, that we were no different from a commercial television station in that regard. It was our decision.

Q. An editorial decision?

A. An editorial decision.

Q. A news judgment?

A. That's right. But I wanted Mr. Forbes to know that he had a remedy, that there was a place for him to go to appeal our [207] decision and that's why I included that information.

Q. Now, you said in your reply to Mr. Forbes something there about the viewers. Would you read that again please?

A. "AETN has made a bona fide journalistic judgment that our viewers would best be served by limiting the debate to elected nominees of the two major parties."

Q. Why did you feel it was the appropriate thing to do, to -- when you wrote this letter to Mr. Forbes and said to him that you weren't going to invite him to the debate, why did you think it was appropriate to explain this in terms of AETN's viewers? What's the reason for that?

A. Well, that's, I mean, in simple terms, that's our reason for being. I mean, we at AETN are there to serve the viewers. That's, I mean, we're not there to serve the government, we're not there to serve our funders, we're there to serve the viewers.

And in any decision I make I try to have -- keep the viewers' interests as best I can ascertain them, determine them, in the forefront of any decision that we make.

Q. Now you found out from Ms. Oliver that Mr. Forbes' campaign, to use your phrase "was not catching fire." How does that relate to serving the interests of the viewers? What's the connection?

A. Well, again, if you think about the amount of time that we were going to devote to the debate, if Mr. Forbes, if we [208] included him in the debate and gave him equal status with the two other candidates and gave him an equal amount of time in the debate then that would have been breaching that trust with our viewers because it would be giving him a status that he had not earned through the support that he had from the voters.

In other words, someone would tune in and see that Mr. Forbes was there and given an equal amount of time with two other people and they would begin to doubt AETN or, if they believe AETN, they would say that it might sway them to vote in one way or another and it might be misleading to our viewers.

Q. Well, now Mr. Forbes earlier talked about the fact that he wanted to have this level playing field.

A. Uh-huh.

Q. You have Mr. Hutchinson up here and you have Mr. Van Winkle, the Democrat and the Republican, Mr. Hutchinson was the Republican. Did you consider that Mr. Forbes was on the same level as Mr. Van Winkle and Mr. Hutchinson?

A. Not from the – not from what we knew, no. He wasn't on at the same level. He was down here and the other two were up here and it didn't seem right to us to give him equal standing and include him in this program.

Q. Okay. Now, you know one of the things that we were talking about and I'm going to go back, if I may Your Honor, [209] and put up the chart of how AETN was organized. Because Ms. Howarth -- I now want to get into the question of political pressure. I've put up the chart again for the jury, which is AETN's Exhibit 3 -- you've got that there in front of you -- and I want to direct the jury's attention to the eight members of the Arkansas ETV Commission who are the people who hire you.

A. Uh-huh.

Q. You made this decision about Mr. Forbes. What sort of discussion did you have with those folks, the eight members of the Arkansas ETV Commission about whether Mr. Forbes ought to be invited to this debate?

A. I don't recall any discussions with any of them. Possibly in my quarterly routine reports to the Commission and at our regular meetings I might have reported on the matter but I didn't have any discussions with them about it.

Q. Well, what sort of political pressure, if any, did you get from anybody in the State of Arkansas there, about whether to invite Mr. Forbes or not?

A. I didn't receive any. No one contacted me about inviting Mr. Forbes or not inviting Mr. Forbes.

Q. When you say "any," are you referring to any political pressure? You received no political pressure?

A. Right. Correct.

Q. Did any of your staff report to you that they had received [210] any political pressure to invite or not invite Mr. Forbes to this debate?

A. No, no one mentioned anything like that to me.

Q. All right, give me just a second if you will.

I'm now going to ask you a question that is a little bit different from what we've been talking about up to now because you've explained I think to the jury the basis on which you made your decisions. But, you know, Mr. Forbes was talking earlier about the fact that he really wanted to tell the people of this district what his views were so I want to ask you whether you made your decision not to invite him to the debate based on what his views were. And, to ask the question properly, to what extent, if any, did you consider Mr. Forbes' views in deciding that you weren't going to invite him to the debate?

A. I didn't consider his views. That wasn't the criteria, that wasn't behind how we made our decision. It wasn't something we considered. Viewpoints were not considered.

Q. Now why would you decide to invite Mr. Forbes based on the level of popular support or the lack of popular support that his campaign generated instead of thinking about what his views were? I mean, why would you do that?

A. Well, again it seemed to us that the best way to serve our viewers was to try to come up with some kind of an objective measure, so we looked at again the kind of support that he had [211] versus any kind of subjective measure. I mean, considering one's views to me is not the kind of thing one does when one tries to have a fair and balanced program. You look for subjective kinds of criteria, or objective kinds of criteria versus subjective.

Q. Now you're the editor and chief of this organization?

A. Uh-huh.

Q. Suppose for a moment that you wanted to consider his views. Could you do that if you wanted to?

A. As a matter of fact, up until, it is my understanding that I could, yes. That we are absolutely the same as a, again

newspaper or commercial station or we could make these kinds of decisions based on any criteria that we wanted to use. That we're really no different, again from a newspaper editor. A newspaper editor can run an article on Mr. Forbes because of his views or not because of his views and we could do the same thing. But, that's not what happened in this case.

Q. I'm going to now show you what's been marked for identification as AETN's Exhibit 13 and ask you to identify it and explain to the jury what it is. I'm sure they're disappointed that I don't have a big chart of it but they'll get to see it later. What is this piece of paper?

A. This is a memo that Amy Oliver typed up with a handwritten note on the top of it to Carole Adonetto, her boss, but it basically outlines the different objective measures, the [212] different criteria that she evaluated when she made her recommendation to me not to include Mr. Forbes in the debate. It is something I asked her to do after we had written Mr. Forbes the letter. I thought it was important to have some kind of documentation in the file about why we made our decision.

Q. Now it couldn't be, could it, that the fact that you are regulated by the FCC, made you think that it might be a good idea to have some document in the file?

A. Yes, as a matter of fact, the FCC does require us to keep in our public file any request that candidates make for time and our response to them and I thought it would be good to have not just the letter but the back up to it, and that was this memo.

Q. Well, you've got the memo there, I don't want you to read the whole thing because it's getting late, but could you just briefly summarize the points in there for the jury so that they know what Ms. Oliver told you about why she made this recommendation and what she found out in her looking at Mr. Forbes' campaign and checking to see what he was doing.

A. Again, they're some of the points I made before, but point number one was that in his last race he had received only 13.8 percent of the vote and that the Arkansas voters did not consider him a serious candidate.

Point number two was that the news organizations also did [213] not consider him a serious candidate, giving him little, if any, coverage.

Q. When you say "news organizations," what news organizations is that memorandum referring to?

A. Well, this one specifically talks about the *Arkansas Democrat*, about a story that they ran about Mr. Forbes that was one inch long and ran on the obituary page and that was one of the few articles, if any, that Amy was able to find.

Point number three was that the Associated Press and a national election result reporting service did not plan to run his name in results on election night.

Point number four was that he apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission.

Point number five, the final point, is that there is no "Forbes for Congress" campaign headquarters other than his house, and all other candidates invited appear to have at least one office in the district and some have two with volunteers and paid staff and he did not.

Q. Ms. Howarth, I'm now going to show you another document and, ladies and gentlemen, I know we've got a lot of documents here but we are coming to the end, at least for the moment. This is AETN's Exhibit No. 14, and would you please identify this?

[214] A. This is a memo from Amy to me on October 12, 1992 and it's a memo where Amy documents a phone call that she had, an interview she gave to the Arkansas Radio Network.

Q. And, what, very briefly, would you tell the jury what this memo says?

A. Again, it reiterates some of the same information, she was asked by the reporter why we decided not to invite Forbes and she said it was because we didn't think he was a serious candidate for several reasons, he got only 13 percent of the vote in the last time, in his last election, he hadn't raised enough money to be listed in the Federal Election Commission files nor had he filed any financial reports with the Secretary of State's Office by the April and July deadline. She said she mentioned the

fact that he apparently isn't taken seriously by the state's press which was rarely covering him, if covering him at all.

Q. I see. All right. Ms. Howarth, we are here -- we are here in Federal Court today and you have been through a lot of hassle over this decision not to invite Mr. Forbes to the debate.

A. Uh-huh.

Q. If you had to do it over again, what would you decide?

A. We would make exactly -- I would make exactly the same decision.

* * *

Cross Examination of Susan Howarth

[218]Q. You say that the main -- your main interest is in the viewers? This is your reason -- the reason you're there?

A. Uh-huh. Yes.

Q. I don't know how I can ask this just right. If there were -- has AETN ever run re-runs?

A. Yes.

Q. And so your precious time can be used to run reruns?

A. Yes, but sometimes they are more cost effective.

* * *

[225]Q. You say you wanted to be -- do the right thing --

A. Uh-huh.

Q. -- do the fair thing.

A. Uh-huh.

Q. Be forthcoming.

A. Uh-huh.

Q. Did you feel any obligation since you testified that you believed you had a duty to allow me to have what you call, what, equal access? Or what was the word you used?

A. Reasonable access.

Q. Reasonable access.

A. Uh-huh.

Q. You felt that you were required to do that?

A. I knew that we were required to offer you reasonable access if you requested it.

[226]Q. Excuse me. You were required to offer me reasonable access?

A. If you requested it.

Q. If I requested it.

A. Correct.

Q. You don't believe you have an affirmative duty to say, "Here's what you need to do," or "This is your right, and this is available to you"?

A. No.

* * *

[231] Q. -- and AETN is a licensed broadcaster, network this state, is there anything that says if you allow candidate A to have a certain amount of access to your broadcasting facilities you have to afford equal broadcasting opportunities to candidates B, C, D and so on?

A. In certain circumstances, yes. Certain circumstances that if it's a non-news event thing you have to do that. If it's a news event which is exempt from equal time requirements which debates have been ruled to be exempt, you do not have to afford equal time opportunities to other candidates. But again, reasonable access is available to any candidate for Federal office.

Q. We'll get back to reasonable access.

A. Okay.

Q. Just talking about this affording equal opportunity, there is four exemptions and you're speaking specifically to one, am I correct, addressing the news event?

A. Uh-huh.

* * *

[238]A. I knew that, and the only thing we ever did was confirm our understanding with our attorneys that it was our right or our responsibility to be able to invite whoever we wanted to the debate.

Q. So it's your testimony that you talked to, I believe, an attorney in Washington, D.C.?

A. Uh-huh.

Q. And the attorney -- okay, now you're saying now confirmed your --

A. Understanding.

Q. -- understanding that if you wanted to -- if you liked my viewpoint -- for example, you wanted to endorse me, you could invite me on? Is that what I understood you to say?

A. It was our understanding, my understanding -- and again, the Washington attorneys confirmed this, that we could invite anyone to participate in the debate for whatever reason. It was our judgment, our editorial decision to make.

* * *

[253] THE COURT: Go ahead and try however you wish to, sir. If I decide it's taking too long, I'll tell you I think it's taking too long.

Q. Okay. I think I'll ask you is it true? Is it true that AETN fulfills a unique role for all Arkansans by providing information, building a better quality of life and facilitating personal growth and awareness? This kind of television is a lifelong learning experience.

A. Yes.

Q. And then you always tried to do the best of its kinds.

A. Yes.

Q. Let me back -- I didn't follow through on one of my questions. I'm sorry. On the surveys and the rates.

[254] Do you know what the ratings are of, say, the commercial television stations, compared to your average of two?

A. Oh, it's been a while since I've actually looked, but theirs are greater than ours.

Q. Theirs -- significantly greater?

A. Yeah, uh-huh.

Q. So would you judge your success in achieving your goals and the policy of AETN by these surveys in the polls?

A. The ratings are just one of the things we look at to evaluate whether we're successful.

Q. But if you had low ratings and if someone came to you and said, "Well, these people aren't doing very well in the polls; they're not doing their job," you're saying that's not a fair criteria to judge AETN by?

A. What I'm saying is that the ratings are one of the things we look at, and we look at other things when we evaluate our service.

Q. But if that was one of the things that someone were judging you on and your job on would you think that was fair?

A. It would depend on who was judging and for what purpose.

Q. Well, say that AETN had to go off the air and no longer -- because there's only so many airways and these people are only reaching a certain small number of people, and, therefore, they're wasting these precious frequencies that there's only so many of. Let's give these frequencies to somebody else. [255] Would you argue that that's not fair because you are serving a purpose by getting certain information out that would not otherwise be brought to the public?

A. Of course I would.

Q. Okay. In your judging of the program -- aspects of program quality your own policy says that you go for thoroughness, credibility, fairness, virtuosity.

Now I looked that up. I'll tell you the definition I looked up. Meaning ethical, virtuous, honest, honorable, principled, right, trustworthy.

A. Uh-huh.

Q. By those definitions --

A. I agree with those. That's what we do.

Q. Another thing that you want to do, I looked up the definition here. "Stimulate." That means enlivening, energizing, galvanizing, motivating, arousing, exciting, provoking and awakening.

A. That's what we try to do.

Q. You try to do that.

A. Uh-huh.

Q. Was one of the reasons that Ms. Oliver told you that I shouldn't be on the debate was because I would provoke or upset the debating structure as maybe they wanted to envision it?

A. No, not that I remember.

[256] Q. Does the word "grandstanding" bring back any memories?

A. No.

Q. None of your memorandums?

A. I suppose it could be there somewhere but I don't recall it.

Q. So if -- was the reasons for not having these -- we'll come back to that later, but I want to ask you now.

A. Uh-huh.

Q. If one of the reasons for not having me included in the debate was because I would make it exciting or arouse interest, would that be a justifiable reason by your own policy to exclude me from the debate?

A. It wasn't one of the reasons.

Q. No, no. I'm just asking you if it was, if I show you in a memorandum that it was.

A. I'm sorry.

Q. Okay. If -- I'm just asking you by your own policy statement here --

A. Uh-huh.

Q. -- would that -- if somebody said that one of the reasons for keeping me out of the debate was because I would instead stimulate or enliven viewer interest, would that be a justifiable reason to exclude me from the debate?

A. You don't look at these things in isolation.

Q. No, just yes or no. This is your policy.

[257] A. I guess I just -- I can't imagine that being one criteria that we would consider and consider in a vacuum.

Q. So it is your testimony that if somebody came to you and said, "This guy is going to change it and it's not going to be boring any more so we shouldn't have him on," you would have rejected that?

A. Yeah. If someone said to me, "We -- but including Mr. Forbes in the debate, the debate will no longer be boring," I

would have said that's an irrelevant criteria in this matter. It's not the particular thing we're looking at, but I mean it would not have mattered in this case.

Q. Well, wouldn't it have been relevant to you to say, "Oh, here I have an opportunity to stimulate my viewers so this is a good idea to bring him in"?

A. Again, you're taking one word out of a whole line of words, and one particular program, no matter how hard you try can never accomplish all of those things.

Q. Okay. Getting away from just one word. You've got a lot of words here in your policy.

A. Uh-huh.

Q. We'll just ask all the words together and then see if your answer is the same, but collectively all these words: informative, challenging, innovation, meaning something new --

A. Uh-huh.

Q. -- boldness, accuracy, balance.

[258]A. Uh-huh.

Q. Enlightening, interesting, educational in the broadest sense.

A. Uh-huh. I would say that the program as we did it met probably, oh, six of those words, accomplished six of those goals fairly well.

Q. And if I had been included wouldn't you have embraced and fulfilled all of those words in every aspect?

A. No. I'm not certain that we have because I don't believe that we would have been fair and balanced, perhaps not as informative in terms of providing the views -- enough time to the views of the candidates most likely to win the race and the candidates that the viewers were supporting.

* * *

[260]Q. This is Mr. Simmons wrote a letter on your behalf to Mr. Dennis Scott inviting you.

A. That's fine.

Q. And you had no problem with inviting him?

A. Had no problem with inviting the candidates that we invited.

Q. And you don't remember whether they were actually on, but if they had accepted your invitation, you would have put them on and broadcast their debate; am I correct?

A. Correct.

Q. I have here a copy of Tuesday, May 30th, 1995, *Arkansas Gazette*, which I've got some copies for you. I'd like you to read this paragraph.

A. Uh-huh.

> "In 1992 Thornton was challenged by an unknown Republican from Benton, Dennis Scott, who spent just $6,212. The incumbent was reelected with 74 percent of the vote."

Q. That means that with Mr. Scott -- you didn't say in his case, "Gee, this guy only has $6,000 in his campaign."

A. Uh-huh.

Q. In fact, at that time, you didn't have the 6,000 because this is much earlier. This is -- so you didn't say "He doesn't have enough money. We're wasting people's time to put [261] him on."

A. No, we said that he had the support of the Republican Party and had garnered the nomination and the public support that that indicated.

Q. By "public support." Do you know what Mr. Scott had to do to get on the ballot to be the candidate?

A. Not specifically.

Q. You didn't check into that?

A. I don't know if our staff did.

* * *

[266]Q. Okay. So I'm going to read that definition again.

> "AETN must not permit its facilities to be used for partisan political purposes by any political organization, officeholder or candidate for office."

Is that true?

A. Right.

Q. Now you mentioned before that you admitted that you ran the ad advertising the debate.

A. Correct.

Q. And the only two people that you listed in this Congressional debate was -- were -- find a copy of that. I want to look at the -- or have you look at the ad if I can find it. The only two pictures and the only two candidates mentioned are Van Winkle and Hutchinson.

A. Uh-huh.

Q. You stated that the reason that you chose Mr. Scott is because he was the Republican candidate in the Second District race.

A. Correct, that he was endorsed by the Republican Party which showed a certain amount of support, indicated a certain amount of support.

Q. And your ad stated that the purpose of the debate was to educate and inform the public about the issues and the candidates.

A. If that's what you say it says.

[267]Q. Well, I have here a copy.

A. Okay. My Exhibit No. 13.

Q. Okay. Thank you, Mr. Marks.

Would you read that to the jury, please?

A. Uh-huh.

> "Do you know your candidate? Get better acquainted with the candidates and the issues. Democrat John Van Winkle of Fort Smith and Republican Tim Hutchinson of Bentonville debate the issues as they campaign for the Third Congressional District seat, live tonight at 7:00, AETN, where learning never ends."

Q. Thank you.

A. Uh-huh.

Q. If says, "Do you know your candidates?" Was I a legally-qualified candidate?

A. Yes, you were.

Q. Were you educating the public that I was?

A. No, not in that debate, no.

Q. But you were educating the public that there was a Democrat and a Republican, partisan candidates, my two opponents?

A. We were letting people know that there were two candidates that were going to debate that evening, yes.

Q. And it says "To get better acquainted with the candidates [268] –

A. Uh-huh.

Q. – and the issues."

A. Yes.

Q. Was I a candidate?

A. Yes.

THE COURT: She said you were.

BY MR. FORBES:

Q. Okay. Did I have views on the issues?

A. I assume you did.

Q You assumed that. Have you ever read the book *1984* by George Orwell?

A. Yes. Quite a long time ago.

Q. A long time ago. And you're familiar with the concept of the non-person?

A. It's been a long time.

Q. Okay. I'll refresh your memory. There was a thing called the ministry of truth. In the ministry of truth what they did was they decided what masses of people were allowed to know or not to know, and if they decided that a person wasn't worthy of being recognized by the Big Brother's Society, Big Brother took that person and their existence and put them down the memory hole so that they became a non-person.

A. Uh-huh.

Q. The state knew they existed but the public was not allowed [269] to know they existed. Does that refresh your memory?

A. To a certain extent, yes.

Q. Does that sound kind of chillingly descriptive of what's going on with this ad?

A. It really doesn't to me.

Q. You can't see it. You honestly can't see that?

A. I testified before the way we came about putting these debates together, and we sincerely believed that it was in the best interest of our viewers to have a debate between the two candidates who had a likely chance to win and to give them an adequate amount of time to express their views.

Q. Did Mr. Scott in the Second District race, did he have a reasonable chance of winning that race against Mr. Thornton?

A. At the time we made the decision to invite him, we thought he did.

Q. Why is that?

A. Again, I don't have a list of the criteria we looked at but one of the things would be that because he was the nominee for the Republican Party, that would indicate a certain amount of popular support.

Q. I believe you testified that you invited Mr. Terry Hays and Ms. – you didn't say the names. Blanche Lambert and Terry Hays. They were the two candidates for the First District –

A. Okay.

[270]Q. – Congressional.

A. Okay.

Q. And you invited both Ms. Lambert and Mr. Hays.

A. Again, that sounds right to me.

Q. This is the First Congressional District of Arkansas.

A. Uh-huh.

Q. Which they gerrymandered the districts but basically the first district is the delta and the Mississippi River line. In the entire history of the State of Arkansas has anyone but the Democratic nominee ever won that election in general election.

A. I don't know, Mr. Forbes.

Q. Did anyone on your staff know.

A. I don't know if they know.

Q. When they're looking for someone to have a reasonable chance of winning an election wouldn't they have looked at the history of a candidate and a party and say, "Well, this guy has

never won. His party has never won. They don't have a chance so we are wasting valuable, precious air time if we invite them?" Isn't that one of your criteria?

A. The criteria is to look. If one is going to sponsor debates – to look to provide a forum for the candidates who have a reasonable chance to win.

Q. How did you determine that Mr. Hays had a reasonable chance to win?

[271]A. Again, because he had the endorsement and the support of one of the major parties in Arkansas. That would have been one criteria. Whether there were more than that I don't specifically remember or -- nor do I have any knowledge of that.

Q. Did you ask Ms. Oliver to call all the media and ask them, "Does Mr. Hays have a chance? Let's hear opinions. Should we put him in the debate?"

A. I don't recall. No, I don't think I made that request.

Q. Would the same thing be true in respect to Mr. Scott in the Second District race?

A. No.

Q. Didn't ask the media what their opinion would be?

A. Huh-unh. No.

* * *

[272] Q. Okay. One of the purposes and goals of AETN -- this is also established by our state legislature. AETN was established by the state.

A. Correct.

Q. "You must further the goals of a Democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens and voters to make informed judgments about the issues of our times."

A. Okay.

Q. "In matters of public importance that may be controversial. Special attention must be invested to [273] assure fairness in treatment of different points of view."

A. Yes.

Q. You say you have an affirmative obligation to do this.

A. Yes. To be fair.

Q. Well, even beyond fairness, you have an affirmative obligation to give special attention to see that something that's controversial doesn't get censored but rather gets broadcast.

A. Yes.

Q. And AETN must provide a bulwark against program domination by any single point of view?

A. Yes.

Q. And it must make efforts to reflect the pluralism of our society by providing access to minorities and all points of view?

A. Yes.

* * *

Redirect Examination of Susan Howarth

[288] Q. We heard from Mr. Forbes about Mr. Scott who was a Republican and about a couple of other folks who were Republicans, were Democrats, major party candidates, as well -- as we all used the term.

When you make a decision about debates and about whom to invite to a debate, what's the significance to you if somebody has the Republican or the Democratic nomination?

A. To me, it means that they have the support of a [289] significant number of people that we serve, our viewers or a significant number of people within Arkansas. And it -- it's not specifically that they are a Republican or a Democrat, the endorsement of the party means that they have a certain amount of support.

* * *

Direct Examination of Amy Oliver Barnes

[292] Q. Ms. Oliver, I'm going to show you now what's already been received as AETN's Exhibit 15. This is a memorandum

from Carole Adornetto, your boss, to you, and it's dated May 12th, 1992.

The subject is the election '92 debates, and the jury doesn't have these documents yet. You'll get them later. But would you please identify what this memorandum is?

A. It's a memo that Carole, who is my supervisor, sent to me asking me to get with Bill Simmons of the Associated Press, and start discussions about debates for November -- well, actually in October.

Q. This is October of 1992?

[293] A. 1992, right.

Q. All right. When you received this memo, what did you do?

A. I contacted Mr. Simmons at the Associated Press and we started laying out the format and discussing other formats that other debate holders had used and what had been successful for them and what had not been successful for them. We actually asked for some tapes and for some debate rules, I think, debate outlines from other places, and started working on that.

Q. And what did you and Mr. Simmons eventually decide about how you were going to recommend that these debates be structured?

A. After looking at the other debates format, we decided that it was probably going to be fairest to all to stick with the major party candidates, inviting them, for the Federal election.

Q. And why did you conclude that?

A. In other states, there had been several people on the ballot who had not received a party endorsement, who had not received popular support, and it tended to dilute the discussion of those debates when everyone was invited up there, so we decided to limit it to the major party candidates.

Q. Now when do you recall first hearing about the fact that Mr. Forbes was going to be a candidate?

[294] A. I don't recall the exact time but I know that there was some discussion about a petition drive.

Q. And what did you and Mr. Simmons do when you first got information that Mr. Forbes was seeking signatures for

petition to become an independent candidate here in the Third District?

A. Well, we went ahead and mailed out the invitations, and we felt at that point it was time to go ahead and get everybody because we knew everybody was involved in their campaigns, it would take time to look at the proposals that we had made and so on and so forth, so we just went ahead and mailed out the invitations, decided we would deal with the issue as it came up.

Q. Did you send an invitation to Mr. Forbes?

A. Not at that time, no.

Q. And I'm now going to show you what's been marked as AETN's Exhibit 16. This is a June 19, 19 -- excuse me -- June 19, 1992 memorandum to Carole Adornetto from you. It's got a little scribbling on the corner.

Please look at this memorandum and describe it to the jury, please.

A. Mr. Simmons and I had discussed the possibility of Mr. Forbes entering the race, and so I sent a memo to Carole outlining our discussion. I had -- I also produced a weekly program called "Arkansas Week" and journalists appeared on [295] that program, and I had asked some of those journalists what they thought about the Third District race, and so after that in considering other things that Simmons and I talked about, I sent this memo to Carole telling her that I didn't think we should invite Mr. Forbes to the debate.

Q. What were your reasons as outlined in that memorandum?

A. Mainly it was that there didn't seem to be any public support for Mr. Forbes and there hadn't been any public support in past races for Mr. Forbes.

Q. When you made your inquiry of these other journalists whom you talked to, what did you conclude from that inquiry?

A. After talking to them that was my conclusion from the information that they gave me that there was no widespread or even competing support for Mr. Forbes.

Q. Now, Ms. Oliver, you just explained to the jury that you worked in news organizations in this state fairly extensively.

You're obviously an experienced news person here. What did you know about Mr. Forbes from your own background, if anything?

A. I remember that he had been or was a member of the American Nazi Party, and would have been what I -- well, others would have called a white supremacist. But other than that I think that's probably it.

Q. Now when you went to go through your fact checking to figure out whether you were going to invite Mr. Forbes or not, [296] to what extent, if any, did you go to check what his political views were in 1992?

A. Absolutely none.

Q. Now why is that?

A. It wasn't -- it wasn't a part of the decision-making process.

Q. What were the tests that you used in the decision-making process?

A. We were looking at how he had performed or I was looking for how he had performed in past races, in past elections. I was looking for any signals, any guides of public -- gauges of public support so I looked for donations, contributions.

Gosh. I looked for coverage. Where other journalists in that area are statewide covering him, and there wasn't any, negligible.

Q. Now what discussions did you have with Carole Adornetto or with Susan or with other people at AETN about your findings about the amount of popular support or the lack of popular support that Mr. Forbes had?

A. I relayed that information to them, that he had not by deadline filed any reports with the SEC to indicate that he had contributions. I related my discussions with other journalists who said that there was no coverage, that no one was being assigned to cover the campaign of Mr. Forbes as they were in other districts. There just seemed to be no support [297] for him.

Q. Now later on, there were Federal election -- that Mr. Forbes filed a Federal election commission report or a Secretary of State's report or that this time you didn't -- you couldn't find one.

A. Right.

Q. Is that right?

A. Right.

Q. All right. I'm now going to show you a -- well, before I show you the next exhibit, let me ask, Mr. Forbes had made a request in August -- August 24, 1992, and the jury has already seen the letter that he sent to Ms. Howarth, and you know we had Ms. Howarth testify about it yesterday, and the letter came in and Mr. Forbes asked to be included in the debate, and what happened then?

A. I believe Susan asked me to go back and check with the sources that I talked to before, newspaper reporters and so on about the coverage, if anything had changed as far as any indicators of public support, of voter support for Mr. Forbes, and it hadn't.

Q. How careful was your investigation when Susan asked you to go check this again?

A. I considered it carefully. That I proceeded carefully. I checked with again not only reporters in Little Rock but also reporters in the Third District. Reporters, columnists, [298] political analysts, so on and so forth, checked with the Secretary of State's Office about voting results.

I checked -- and also about campaign contribution reports. I think I did a pretty thorough investigation.

Q. Now what did you recommend to Susan?

A. My recommendation stood. It's from my earlier recommendation. I didn't think that it would be of service to our viewers to include Mr. Forbes on the debate.

Q. All right. Now I'm going to show you what's been received already as AETN's Exhibit 13. This says on it "Ralph Forbes." It has a little stamp that says "Received by Carole Adornetto on September 14, 1992," and then it's got some scribbling up here with the letters "AO." And I'm going to ask you to identify this document.

A. This is a memo I sent to Carole and, according to my note, I gave a copy to Susan and one to Mr. Goss. Again, it was outlining the same things that I just discussed about the seriousness of Mr. Forbes' campaign as the voters were seeing it, and, again, that he had lost his last race. He had not performed well in other

races, the state's news organizations were not considering him a candidate, a serious candidate, meaning that he had not a serious chance to challenge the two main front runners in the campaign.

The Associated Press, Mr. Simmons had told me that the Associated Press in its national election results were not [299] going to report Mr. Forbes' results in that reporting process and that he had little, if any, financial support.

Q. Now was this the memorandum that Susan asked you to write so that it could be put in the Federal Communications Commission public inspection file, do you recall?

A. I believe -- yes, I believe so.

Q. All right. I'm now going to show you what's been previously received as AETN's Exhibit 14. This is a memorandum to Susan Howarth from Amy Oliver re "Forbes/ARN interview," and it's dated now October 12, 1992. This is ten days before the debate was going to take place.

Would you please identify this document for the jury?

A. This is a memo I think to Susan to let her know that I had received a call from a reporter, Paula Cooper of the Arkansas Radio Network, asking about our decision not to include -- or to invite Mr. Forbes to the debate, and outlining, again, what I had told Paula which was that the voters obviously did not consider Mr. Forbes a serious candidate, obviously because there was no coverage going on in the area and because there was no appearance at rallies, no invitations seemed to be going out his way to appear to voter groups and so on.

Anyway, the same things I had outlined in the other memos that he had little voter support in previous elections and so on.

Q. All right. Now, Ms. Oliver, I'm now going to show you a [300] bunch of thick, official-looking State of Arkansas documents, and I want to assure the jury that I am not going to ask her to read a tiny snitch of this.

First, is what's been marked as AETN's Exhibit 17. It's the Arkansas Election Results for 1986 compiled by the Secretary of State, and I've got something tabbed here. This is the election results for the U.S. Senate in 1986.

MR. MARKS: Mr. Forbes, that's Exhibit 17.

BY MR. MARKS:

Q. Would you please read the -- who the candidates were and what percentage of the votes each received?

A. Dale Bumpers -- I'm sorry. I'm going to have to hold this closer. My eyes are going bad here.

Q. That's all right.

A. Dale Bumpers received 62.28 percent of the vote. As a Hutchinson received 37.7 percent, and Ralph Forbes received one one-hundredth of a percent.

Q. That is .01 percent?

A. Correct.

Q. All right. I'm now going to show you what's been received as the -- as AETN's Exhibit 18. This is the Secretary of State's compilation of Arkansas Election results for 1990, and I've got the 1990 runoff primary for Lieutenant Governor in the Republican Party here.

Now who are the two candidates?

[301] A. Muskie Harris, Kenneth Muskie Harris and Ralph Forbes.

Q. Now this is the Republican Primary runoff, so the winner becomes the Republican candidate for Lieutenant Governor and gets to run against the Democrat; is that right?

A. In the general election, right.

Q. In the general election. All right.

What percentage of votes did the two candidates receive?

A. Kenneth Muskie Harris received 86 percent, and Ralph Forbes received 13.8 percent.

Q. And, Ms. Oliver, the results in that book are tabulated by county, are they not?

A. Yes.

Q. Now how many counties did Mr. Forbes win?

A. It -- I'd have to look closely but it doesn't appear he won any, just glancing. No.

Q. That's the answer?

A. Yes. He won no counties?

A. Right.

Q. Let me move now to what's already been received as AETN's Exhibit 20. Now this is the document from the Secretary of State of Arkansas and it's a report of receipts and disbursements for Mr. Van Winkle's campaign in 1992. So this is the report of the amount of money raised by the Democratic candidate who was one of Mr. Forbes' opponents.

And I'm going to ask you to look at that report and tell [302] the jury how much money Mr. Van Winkle raised.

A. $430,516.

Q. All right. Could you just repeat that again for me?

A. Yes. $430,516.

Q. All right. Now I've got AETN's Exhibit 19 already received which is the same sort of report but for the Republican candidate, Tim Hutchinson. And I'm going to show you and ask you to read to the jury how much money Mr. Hutchinson raised in that campaign.

A. His net contributions were $370,630.

Q. And now I'm going to show you what's previously been received as AETN's Exhibit 21. This is another one of these reports from the Secretary of State of Arkansas and it's a report of receipts and disbursements for Mr. Forbes. The same question, Ms. Oliver. How much money did Mr. Forbes report as having raised in this campaign?

A. $9,754.

Q. Now I'm going to show you the official Arkansas election results for 1992. This has been marked as AETN's Exhibit No. 22. It's already been received, and on page 49 there is a tabulation of the results for the 1992 Arkansas General Election for U.S. Representative of the Third District.

I'd like you to tell me first how many candidates there were and what their names were.

A. John Van Winkle was the Democratic nominee. Tim [303] Hutchinson was the Republican nominee. Ralph Forbes was an independent. And Rex Petty was a write-in candidate.

Q. How many total votes were cast?

A. Total votes were 249,494.

Q. How many votes did Mr. Hutchinson receive?

A. Mr. Hutchinson received 125,295 votes.

Q. Was he the winner?

A. Yes. With 50 percent of the vote.

Q. And Mr. Van Winkle's vote tally and percentage?

A. 117,775. He had 47 percent.

Q. And Mr. Forbes' figures?

A. He had 6,329 votes with 2.5 percent.

Q. Now, Ms. Oliver, I suppose we ought to -- we'll leave Mr. Petty because I want to concentrate on Mr. Forbes and on your recommendation to Susan that Mr. Forbes not be invited to this debate.

Hindsight is always a luxury but we're here in 1992. We have these reports about the election results, and obviously we had this long litigation and you've had a great deal of time to think about your recommendation to Susan that Mr. Forbes not be invited to this debate.

If you had the opportunity to go back in time and make this recommendation over again knowing what you know now, what would your recommendation be to Susan?

A. It would be the same, the same one that I made to her two [304] years ago -- or three years ago.

Q. And why is that?

A. I believe it was the right thing to do. I believe that the voters had told us in past elections that they didn't consider Mr. Forbes' candidacy a serious challenge to any other candidate and I believe they were telling us that in 1992, too.

Not only indicators prior to the election but the final election results.

Q. Ms. Oliver I'm almost finished but I just want to ask you a couple of questions about whether you received any political pressure from anybody whatever about your -- about the recommendation that you were going to make to Susan about whether to invite Mr. Forbes. To what extent, if any, did you receive any political pressure at all?

A. None. I received absolutely none. And being a reporter for 20 years, I would have sensed it and I would have immediately rebelled.

* * *

Cross Examination of Amy Oliver Barnes

[306]Q. Okay. Proximity, relevance, conflict, novelty and interest are the ones you remember?

A. Right.

Q. So in doing anything with the newsworthiness, those would be sort of a guideline?

A. Yeah, those were a guideline. I remember Mr. Tyson and my [307] professors now, teach me that, and I've learned along the way that the overriding factor is viewer need and interest or reader need and interest, that every case has to be judged individually. That there are no rules in journalism so to speak.

Q. No rules in journalism?

A. Right. No absolutes.

* * *

[313] Q. Now, did you happen to think "Gee, I better call Mr. Forbes and ask him, 'Are you going to file one?'"

A. You know, I think I discussed that with another reporter and I think I discussed it with Simmons about his discussions or his reporter's discussion with you or someone else about that. I recall something about, that Simmons told me I believe, that you had no plans to file or something like that. But I couldn't say for sure.

Q. So either Mr. Simmons or someone from AP was calling me to check on things and you were going by what they told you.

A. Yeah, that someone had mentioned that, yes there was no.

Q. Any other reporters that you had talked to that had called me and checked on some of these others things? We'll save time if I don't have to ask you every question about if you called me.

A. Nothing that comes to mind right now.

Q. But you never called me about anything?

A. No.

* * *

[318] Q. I have here a document, it's my Exhibit – I'm going from memory. I'm going to say 9. It's the Certified Election Results from the Secretary of State.

A. Uh-huh.

MR. MARKS: Hang on a second. Is it this one?
MR. FORBES: Yes.
MR. MARKS: It's 3.

BY MR FORBES:

Q. It's Plaintiff's Exhibit No. 3 and on page, it's got a 14 on the bottom. It's the 1990 primary, the Lt. Governor Republican Primary.

A. Uh-huh.

Q. Which was a three person race, and in this column there are two, the top two, and I heard you say something about – it's hard to read. So I took and I put little check marks under the percentage in both columns for certain counties.

A. Uh-huh.

Q. There are 16 counties in the Third District of Arkansas [319] and I would like for you to read for the jury the county, if you can, I'll say just the percentage.

A. The percentage of both candidates?

Q. I put the check mark right, just this column.

A. For Ralph Forbes?

Q. Yes. Can you tell?

A. Well, sometimes your marks aren't clear about which. Okay. Baxter, I know Ashley County is not in here, so Baxter is 55 percent, Benton is 60 percent, Boone is 55 percent, Carroll is 54 percent, Crawford is 55 percent, Franklin is 50 percent, Johnson is 51 percent, Logan County 58, Madison County 63, Marian 50, Newton 71, Polk County 57, Pope County 41, Searcy.

Q. It should be Sebastian.

A. Well, is it Scott, is that what you –

Q. Okay, Scott is what I want.

A. Scott. Okay, 63, Sebastian 55 and Washington 54.

Q. Okay. Thank you.

A. Uh-huh.

Q. These are the percentages that, of the votes that I received in a three way race.

A. Uh-huh.

Q. On May 29, 1992.

A. Right.

Q. Is it very rare in politics, or is it rare in politics or [320] in an election, that in a three way race, anyone ever in a three way race, wins an absolute majority and escapes a run-off?

A. In a three way race I don't know what the figures are on that. You mean the chances?

Q. Would it be newsworthy to you? I mean, normally, isn't there a run off when there is more than one candidate in a primary?

A. Sometimes yeah. But whether I could say it was a majority of time, I don't know.

Q. Polls are based on statistics; is that not true?

A. As far as I know.

Q. Well, that is the theory behind it.

A. Right.

Q. Now here we're not doing a sample poll of ten voters in Pope County or 20 voters in Sebastian County. These are all the people who were eligible to vote that wanted to vote and went out and voted in that election. Is that not true?

A. In the primary.

Q. The primary. In the 16 counties that comprise the Third District, which it would be this Congressional race, you read yourself 63 percent, 71 percent, 55 percent, 60, 58 percent. Does that to you show a substantial amount of popular support for my candidacy in these sixteen counties that make up the Third District of Arkansas?

[321] A. It says you got the majority of votes in that race.

Q. That was in 1990.

A. Right.

Q. Two years, in fact a year and a half before you decided I had no popular support in this area.

A. It was the primary before the run off that you lost.

Q. The run off. Okay.

Let's go back to this document here. The statewide totals, this is the official totals.

A. Uh-huh.

Q. What is the statewide total that I got?

A. The statewide percentage?

Q. Uh-huh. It's at the very bottom.

A. Okay. Well, according to this document, this is the primary. Okay. I thought you were asking me about the run off.

Q. No, no.

A. Okay. Well, the statewide totals in the primary you got 46 percent and Kenneth Musky Harris got 35.

Q. In this race on May 29th, statewide, I got almost 47 percent and my opponent got 35 percent.

A. Uh-huh.

Q. And the next one he got eliminated? I mean there was a third person.

A. Uh-huh.

* * *

[326] Q. Excuse me, I think I'm very close to being done with this.

You said that you decided early on that you only wanted to invite the major party people to the debates.

A. Uh-huh.

Q. Was that based upon partisan? Isn't that the very definition of partisan parties?

A. It was based upon what had worked in other debates.

Q. I'm not asking. I believe you were here and you heard me ask Ms. Howarth about the restrictions and the limitations on partisan.

A. Uh-huh.

Q. Support or by AETN. I'm asking you now, when you invited [327] only the major party candidates, is that not by definition a partisan decision?

A. No really. It was the fairest decision we could make.

Q. Was it fair to me?

A. I think it was fair to the people of Arkansas, to the voters of Arkansas and I had to consider them.

Q. Was it fair to the several thousand people that signed my petitions?

A. It was fair to the several thousand people who hadn't voted for you or who weren't showing support for you.

Q. I've got a question here. I can't figure out my notes.

You said that you had talked to a number of journalists and one of them was the round table, "Arkansas Week".

A. Yeah, I was producing "Arkansas Week".

Q. Okay. But you stated that you had asked the people. Who were those journalists?

A. Max Brantley.

Q. Max Brantley.

A. Rex Nelson, Joan Duffy. We had -- we were focusing on some of the districts or on all of the districts, and the races in the districts so we were trying to get in journalists from those districts. If I recall I think Jack Mosely appeared, Dave Edmark, those were the Arkansas Week guests I spoke with. I spoke to other journalists.

Q. Did all of them tell you not to invite me?

[328] A. No. I was getting general information from them. I never asked if you should be invited or not.

Q. What were your general information type questions?

A. What kind of coverage you were receiving. What kind of support, if you were appearing at rallies. What kind of support you had. If people were inviting you to appear. If you were appearing on courthouse squares and shaking hands or in public places and so on.

Q. And if I were doing that and they weren't aware of it would that be a valid basis for you coming to your conclusion?

A. They would be aware of it I would think.

Q. How would they be aware of it?

A. Well, because they were covering the rallies that all the other candidates were showing up at. And all the other places the candidates were going.

Q. Your testimony is that you never called me to ask me what I was doing?

A. Hmm. I don't guess I did, no.

* * *

[331] Q. In an earlier election, 1986. This would be my column here showing my vote total for that column.

A. In 1986, okay. This was with Gene Novels.

Q. Yes.

A. Your vote total was 46.98.

Q. That's a statewide vote total.

A. Right.

Q. That's nearly 50 percent by the official results.

A. Right.

* * *

[341] BY MR. FORBES:

Q. Is it your testimony that you decided not to call me because, in large part, because I had no chance of winning the election?

A. I didn't determine that there was a need to call you. I had facts that I had gathered from other sources.

Q. Going one step further, was it your determination to tell the station or to tell Ms. Howarth, not to invite me because I really had no chance to win the election?

A. I didn't think that you were a challenger.

* * *

Redirect Examination of Amy Oliver Barnes

[342] Q. Mr. Forbes asked you a great deal about the 1986 [343] Republican Lieutenant Governor's primary and he also asked you many questions about the 1990 Republican Lieutenant Governor's primary, which was obviously four years later.

How would you describe how Mr. Forbes did in the 1986 and 1990 Republican Lieutenant Governor's primaries?

A. He did okay. In the first primary with Gene Nobles in 1986 I think he had 46 percent of the vote, and in 1990 he won a spot in the runoff.

* * *

[344] Q. And how did you evaluate his record as a candidate, generally, in all the races that he had tried to run in and had run in, in fact?

A. Overall he had not made a significant impact.

Q. Now, Ms. Howarth, Susan, asked you to go back, and she asked you two or three times during the course of the summer and early fall of 1992, to go back and make a judgment, make a recommendation, about whether to invite Mr. Forbes.

How did you factor in Mr. Forbes' record as a candidate, with these four losses, in judging whether to invite him? How much of a part did that play?

A. That was one of the guiding gauges I was looking at. It was one of the things that told me that the voters of Arkansas, our viewers, had considered Ralph Forbes, didn't particularly care to hear what he had to say obviously by their repeated votes and their repeated rejections.

Q. All right. Now, I want to shift because I want to move away from these particular votes for a moment.

This morning Mr. Forbes also asked you a number of questions about philosophy and about his views and how you [345] might -- how you might or might not look at his views, and I just want to make sure we're all crystal clear on this.

How much did you consider Mr. Forbes' views in making your recommendation to Susan?

A. Not at all.

Q. And why not?

A. It was not a factor in the final decision. It -- the overall guiding force for me was what would best serve our viewers. And a discussion concerning his viewpoints could be said to have served our viewers but, it seemed from the record, that the viewers didn't care to participate in that discussion or hear that discussion.

Q. Very well. And when you say "the record" you are referring to what you discovered about Mr. Forbes' --

A. Right.

Q. -- campaign in the Third District?

A. Right.

Q. And the fact that it just hadn't attracted much support?

A. Right.

Q. Or any support?

A. Right.

* * *

Direct Examination of Oscar Eugene Goss

[350] Q. Why were you there?

A. Well, I was there because we expected Mr. Forbes to show up and demand participation -- demand to be allowed to participate in the debate. And management felt that some -- someone in a position of responsibility at the network should be there to speak for them.

Q. Now, briefly, would you describe what happened that evening?

A. Okay. We had placed the -- in the first place no one is allowed in the studio area except the actual participants. By that I mean no political attendants, or political assistants. So, all of those folks, for both candidates, were placed in the conference room just off the lobby. The press, for all practical purposes, was back in the studio; although some were up in the lobby, anticipating a visit by Mr. Forbes.

Mr. Forbes did arrive. I couldn't tell you what time. It was very close to broadcast time when he arrived and asked to [351] be -- and you know was welcomed -- and was asked to be -- asked to be allowed to participate in the debate and was told no, that the decision had been made that he should not participate. He was invited to come in and sit and watch.

Q. And that evening, what instructions had Susan given you, if any, about a -- the possibility of a reasonable access request from Mr. Forbes? And, by "reasonable access," I mean a request

for reasonable access -- what you've heard of as Section 312(a)(7) of the Communications Act, and this would be a request to speak, to appear, in his own program. Not part of the debate, but to appear separately?

Now, it's long question so I'm going to ask it again. To what extent, if any, had you had instructions from Ms. Howarth, about a reasonable access request that might come from Mr. Forbes?

A. Well, both she and our legal counsel had advised us that those are, for want of a better phrase, trigger words. And if any candidate for Federal office comes to any broadcast licensee and demands or requests reasonable access, they are to be given reasonable access.

So, my instructions were, if Mr. Forbes asked for reasonable access, I was to respond that that would be relayed to management and, in my opinion, he would be granted reasonable access because the law required it. Then I was to, you know, report back to her.

[352] Q. "Her," being?

A. Susan Howarth. Uh-huh.

Q. Now, were you expecting -- were you primed -- were you ready to hear the words reasonable access?

A. I'd have to say I was listening for them.

Q. And did Mr. Forbes request reasonable access?

A. He did not use those words in any way during that evening.

* * *

Cross Examination of Oscar Eugene Goss

[355] Q. "Mr. Goss, ten or fifteen minutes of the debate are already gone, but I'm willing to drop the lawsuit. I don't want to sue anybody. I just want to express my views. If you'll let me in now, even with less time I'll accept that."

* * *

A. I have some recollection that you spoke to me in terms of requesting equal time. And I said to you that the equal time statute did not apply.

Q. Okay. But we're talking about -- I did -- do you recall me asking you what I needed to do to prepare when I had -- I think I used the phrase my separate but equal time?

A. I have a recollection that you used the phrase that you'd requested equal time and the equal time statute does not apply in the case of debates.

Q. Do you recall --

A. I'm sorry. In the case of news events. Go ahead. Excuse [356] me.

Q. Do you recall my saying "separate but equal"? Does that phrase ring a bell?

A. I don't recall "separate but" no, sir. But it wouldn't make any difference.

Q. I understand your position.

A. Okay. Fine.

Q. I'm just asking if you recall --

A. All right. Fine.

Q. -- my saying that.

A. No, I don't recall that.

Q. Do you recall me asking you to convey to the other two candidates that I wanted to challenge them again in a debate and on the time that I expected to have from AETN?

A. I recall your saying or indicating that you would like to meet with the candidates, and I told you that they would -- that we would advise them that you were present and wanted to see them.

Q. And then you asked me to go out --

A. And I said if you visit with them you'll -- you know, if you all have a meeting you'll have to visit outside. And at that point you -- thereabouts you went outside.

Q. You say you were tuned for the trigger words. "Reasonable access"?

A. That's correct.

* * *

[374] Q. Okay. Are you familiar if I told you the 16 counties of the Third District, would you know if you cover –

A. Yeah, we cover approximately about three-quarters of the counties in the Third District.

Q. Would you describe your news and your station as dominant or very important in this area?

A. It's a very close race between us and Channel 5. In the Fort Smith area, Channel 5 is stronger because of their signal a little bit. And in northwest Arkansas we're very dominant, two to one.

Q. So if someone were interested in news and the political area in the Third District of Arkansas, would they be remiss not to contact you and your station?

A. I would imagine because really in our area there's only Channel 5 and us doing nightly news.

Q. Did Ms. Amy Oliver or anyone from AETN contact you in regards to my candidacy in 1992?

A. I remember Amy asked me to be a part of the debate, to be on the panel.

Q. All right. You were one of the panelists in the debate in Conway, Arkansas?

A. Right.

[375] Q. Other than that, did AETN or Amy Oliver or anyone contact you in regard to my candidacy?

A. I don't remember that, no.

* * *

[380] Q. Mr. Cannon, do you recall that you or your station gave any coverage at all to my candidacy in 1992?

A. I believe we did.

Q. Do you know why you gave that coverage?

A. Because you were an independent candidate, if I remember right.

Q. When you decide to put something on the news, do you use some criteria to do that?

A. Yeah.

[381] Q. Is there such –

A. Yes.

Q. – a thing as the element of newsworthiness?

A. Sure.

Q. Do you remember what those are? Can you tell us what some of those might be?

A. It's been a while since I studied the books, but it's just kind of embedded in you.

Q. Okay.

A. You know, the – the location of the story is relevant to us. Do you want me to list the whole –

Q. If you can remember very briefly, very briefly. If not, I remember you told me seven earlier.

A. The novelty of the story, the relativeness of how it affects our viewers' lives comes into play. Let's see. The interest, of course, whether we think it's of interest to our viewers, things like that.

Q. And those are the reasons that you decided whatever news stories about me you did?

A. Oh, we also have a public commitment, I believe, when it comes to races that it's our – it's our duty and it's our job to let as many people that want to hear what the candidates have to say. It's our job to be that platform in a way.

Q. So as a commercial station, a non-government entity, you're saying that you feel it's your duty to serve the public [382] by allowing someone like me to express my views when it's newsworthy.

A. If you're a legitimate candidate, yes.

* * *

Direct Examination of Burnham Wilcox Edson

[386] BY MR. FORBES:

Q. Could you state your name and your occupation and business residence for the jury, please?

A. Yes, my name is Burnham Wilcox Edson. I work for KFSM TV. I'm the news director. That's at 313 North 13th.

Q. Fort Smith?

[387]A. Forth Smith. We usually use a post office box.

Q. Okay. First of all, I want to apologize. I'm going to make this very briefly, and I want to thank you for appearing.

A. Okay.

Q. In respect to the 1992 elections, do you recall inviting me or having me on your station at any time?

A. Yes, I do.

Q. Okay. Can you tell us when they were and -- tell us when they were.

A. I can do that. I might have to get down to the back. I'm going to have to use my cheaters, too.

Q. I do, too. I hate to admit it but --

A. It gets worse every day, I think. The first time we had you on was May 13th, 1992.

Q. Okay. Did you call me and invite me? Do you recall?

A. Yes.

Q. Can you tell us why you did that?

A. We were doing all of the candidates for the Third Congressional District.

Q. And in respect to me in particular why did you fell -- did you have any -- I don't want to put words in your mouth. I believe you told me some reason why you had called me.

A. Well, we considered you a candidate. You filed -- or at least we thought you had filed and you were a candidate. We had had you on previously, and we had you on after that.

[388] Q. I'm sort of losing my train of thought here. You said another time period within this time frame.

What was the date of that?

A. The second time we had you on that year was September 2nd of '92.

Q. Okay. And the reason for that was something with a news event?

A. I've got the write-up that goes into your appearance, and basically the reason we had you on September 2nd -- may I read it?

Q. Sure.

A. "Independent Congressional Candidate Ralph Forbes says a jury and not a judge should decide whether life begins at conception. The London, Arkansas, man is petitioning the courts for a trial by jury to determine whether unborn children are legal persons under the law. He compares his case to the same Dred Scott decision," and on and on.

And basically that's why we had you on.

Q. So I was a candidate but it was also what's called a bona fide news event?

A. Exactly.

* * *

[391] BY MR. FORBES:

Q. If someone were very interested in the political situation here in the Third District, would a logical course of action be to contact you and-or Channel 5?

A. Generally speaking, I think most candidates do. Most candidates want to be on. Most candidates want to be heard. Most candidates want to answer questions from the viewing public.

Q. Does the viewing public have an interest in asking these [392] questions?

A. I wish you'd see our phones light up.

Q. When I was on did you have the call-in service?

A. We did.

Q. Was there any interest in calling me?

A. I don't remember or recall any dead air in terms of my having to ask you questions. I think the problems were --

Q. Do you recall ever telling me that it was an unusually large response?

A. Mr. Forbes, I can't recall that. You know, there are so many, every day, five days a week.

Q. Let me put it this other way. Can you remember if there was a fairly large response?

A. I'm sure there was a good response because I don't recall any time where we had to sit and I had to ask you questions because you were asking the questions.

Q. So there appeared to be an interest by the public or the viewers –

A. Cqorrect.

Q. – in what I had to say?

A. Correct.

Q. Did Amy Oliver or anyone from AETN call you in respect to my candidacy and ask you any questions about it?

A. Not that I recall.

Q. During the entire 1992 campaign. I mean, it's a long [393] period of time.

A. All I remember is AETN asked me to come down and be part of a debate.

Q. And did you do that?

A. I did do that.

Q. And this is the only call you – it's the only contact you remember with them?

A. That's correct.

* * *

Jury Instructions

[475] You should keep these in mind as I explain the law applicable to this case. What all that said was that you will decide this case by answering one or more – actually it will be at least two of the following three interrogatories.

The first one reads, and by "interrogatory" that simply means a question that you're asked to answer.

Interrogatory Number 1. Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network? And there is a place for you to answer either yes or no, a place for you to have your foreperson whom you will have elected when you go in, date it, sign it.

When you've completed that interrogatory go on to Number 2 which says:

Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of his objections or opposition? I'm sorry, let me try that again.

Do you find from preponderance of the evidence that defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views? A place for you to answer either yes or no, again, a place for the [476] foreperson to date it and sign it.

* * *

[477] Plaintiff contends and has the burden of proving that defendants excluded him from the debate because of objections or opposition to his particular views. The Government violates the First Amendment when it denies a speaker access to a political debate, to suppress the point of view he holds on a topic that is encompassed within the subject matter being addressed.

The Government may exclude a speaker if he wishes to address a topic not encompassed within the purpose of the debate or for any other reason that is reasonable in light of the purposes to be served by the debate and the surrounding circumstances.

* * *

Jury Excused to Begin Deliberations

[484] THE COURT: The jury is out of the courtroom and the door is closed. It is my practice to simply say at this point that I will consider the record made on the instructions earlier to be remade at this time. I will, however, give either of you an opportunity to make any record you wish to on the Court's reading of the instructions, any record to be made.

MR. MARKS: Your Honor, I'm not sure, but other than the 11th Amendment point, we have nothing.

THE COURT: All right. That has been raised, of course, already, yes, sir. You may give the exhibits to the jury and they may begin their deliberations.

Let me say one thing. You all may be seated just for a moment.

MR. FORBES: Your Honor, is that an exhibit also?

THE CLERK: I haven't taken them back yet.

[485] THE COURT: They're going to go back just here in a moment, and it is an exhibit, also.

It occurred to me while you all were doing closing arguments that the record is really not very clear in respect to an issue that the Court of Appeals spent quite a little bit of paper talking about, and that is the type of forum that this is.

I guess it should be obvious from the Court's instruction that the Court has ruled that the type of forum we are talking about in this case is a non-public forum. That's what at least five of the 11 justices of the Court of Appeals believed when they wrote the opinion reversing this case and reversing their case.

We spent a good deal of time trying to determine whether that issue, the determination of that issue was a question of fact for a fact finder to determine or a question of law for the Court to determine. We couldn't find anything that was on point at all. I see Mr. Marks grinning. He may have done the same thing and run into the same issues, probably misposted that work if that was done but in any event whoever did it.

MR. MARKS: Certainly not I, Your Honor.

THE COURT: The Court believes that -- well, one of the reasons that has not come up before is very few, if any, of these cases have ever been tried to a jury before. There [486] have been very few jury First Amendment cases tried.

The Court has concluded that at the very most it's a mixed question of law and fact. Under the circumstances of this case there was not any dispute about the circumstances of the situation. This was a public television station which doesn't normally provide access to the public at large. They did in this case do it only for purposes of this debate. The Court has determined, therefore, that based on uncontested facts this is a

non-public forum much like the school -- mail facilities that were at issue in *Perry v. Perry Local Educators*, 460 U.S. 37 (1983).

You all may remember that that's a case in which a school teacher's union won an election or won -- somehow or other they got a right to represent the school teachers. They were given access to the school mail facilities. The rival union was not.

This seems to me to be more closely that kind of a case than any other kind of case. Besides that, as I said, at least five of the Court of Appeals judges seemed to believe that it was that kind of forum; therefore, the Court believes that it is and I have instructed it on that basis as should be obvious in the instructions that were given.

Now having said that, does either side wish to say anything?

MR. MARKS: Let me move this around, Your Honor. [487] I'll try to say this as succinctly as I can.

Our view is that a non-commercial educational television station licensed to a state is a non-public forum.

THE COURT: Right.

MR. MARKS: The only way it can forfeit that status is if it lets itself be subject to political pressure.

THE COURT: Yeah, you've said that several times. I know that's what you believe.

MR. MARKS: Yes.

THE COURT: I can't support that by any cases but I know that's what you believe.

MR. MARKS: And, Your Honor, we may have an opportunity to talk about the *Chandler* case and in your case some community service and those others.

THE COURT: And the Eighth Circuit might agree with you. I recognize that. And I don't think they have said that yet and I don't think they said that in this case, as I said, but they may, and if they do the way I crafted the interrogatories I hope that that means that if they say, "Yeah, he's right," then all they have to do is say "Reversed and dismissed," not "Reversed and remanded for a new trial."

MR. MARKS: Your Honor, I share your hope, but what it all comes down to at this stage of the trial is that we certainly agree that AETN is a non-public forum and that's appropriate.

[488] I should add only one thing, Your Honor. I know that you took out the word "solely" from Instruction No. 6 or 8.

THE COURT: Yeah. And it comes out of a Supreme Court decision I found out after I took it out.

MR. MARKS: And I think that I was going to say that I think the word "solely" is properly in there, and I suppose it's incumbent on me to make that point in the record. I think it's properly stated that only if the sole motivation is to suppress his speech is it an issue under the First Amendment and actionable under the First Amendment.

THE COURT: I think that's certainly appropriate for you to make that record. Anything else?

MR. MARKS: No, Your Honor.

THE COURT: Thank you all very much. Court is in recess until the jury returns.

MR. FORBES: Those questions –

THE COURT: Yes. I'm sorry.

MR. FORBES: – on the forum issue were not really decided by the Eighth Circuit, I believe is my understanding.

THE COURT: No, they did not. They did not. I would agree with that.

MR. FORBES: But the State –

THE COURT: They talked about it a lot but they did not really decide that issue. I would agree.

MR. FORBES: Yes, sir. I would say that the State on [489] their petition for certiorari did make those arguments, and the Supreme Court basically denied *cert*. And what effect that has I –

THE COURT: Well, it has a lot less than the news media seems to think it has. At least most of the news media.

MR. FORBES: And I think there would be another question which I hope I put in my proffered – is that how you pronounce it, proffered or proffered instruction?

THE COURT: Either one. Either way you like to say it.

MR. FORBES: Thank you.

The question of the protection of – while it's inherent in everything we're doing here, very specifically the inherent protection what will protect in the future? Perhaps Democrats, Republicans, Masons, Baptists, whatever, in other words, I think that needs to – I don't know that we really addressed that very specifically.

THE COURT: You all, if the opportunity arises and I suspect it will one way or the other, you all can argue all this in the Court of Appeals. This case is done, it's back there in the jury. You all can argue all these things –

MR. FORBES: I just thought I should have said that for the record.

THE COURT: You all can argue all these things and I'm not trying to keep you from making any record, either of [490] you, that you want to make, but we don't need any argument now. It's past that.

Carl, I saw them open the door. Are they wanting to go home? A while ago.

COURT SECURITY OFFICER: Oh, no.

THE COURT: That didn't mean anything. Okay.

Court is in recess till the jury returns or decides to go home, whichever it is.

(Recess.)

* * *

After Recess

[502] THE COURT: Mr. Davis, has the jury reached a unanimous verdict?

MR. DAVIS: Yes, Your Honor, we have.

THE COURT: If you'll hand those papers to the marshal, please, sir.

The Court's going to read the interrogatories that were completed.

Interrogatory No. 1. Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political

pressure from anyone inside or outside of the Arkansas Educational Television Network?

The answer is no. It's signed by Mr. Davis and dated with today's date.

No. 2 reads, Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views?

The answer is no. And it's also signed by Mr. Clinton Davis, the jury foreperson and dated with today's date.

STATE OF ARKANSAS

SECRETARY OF STATE

W. J. "Bill" McCuen
Secretary of State

To All to Whom These Presents Shall Come, Greetings:

I, Bill McCuen, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of

THE CERTIFIED ELECTION RESULTS FOR THE FOLLOWING:

MAY 27, 1986
REPUBLICAN PRIMARY FOR LIEUTENANT GOVERNOR

MAY 29, 1990
REPUBLICAN PRIMARY FOR LIEUTENANT GOVERNOR

NOVEMBER 3, 1992
GENERAL ELECTION
UNTIED STATES HOUSE OF REPRESENTATIVES
DISTRICT 3

NOVEMBER 3, 1992
GENERAL ELECTION
UNITED STATES PRESIDENT

PLAINTIFF'S EXHIBIT

SEAL OF THE SECRETARY OF STATE ARKANSAS

In Testimony Whereof, I have hereunto set my hand and affixed my official Seal. Done at office in the City of Little Rock, this 5TH *day of* OCTOBER *19* 94

Bill McCuen

Secretary of State

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REPUBLICAN PRIMARY ELECTION RESULTS 1986
LIEUTENANT GOVERNOR

COUNTY	GENE MAHLES		RALPH FORBES		TOTALS
ARKANSAS	12	63.16 %	7	36.84 %	19
ASHLEY	19	59.38 %	13	40.63 %	32
BAXTER	628	59.58 %	426	40.42 %	1054
BENTON	2682	54.62 %	2228	45.38 %	4910
BOONE	152	62.30 %	92	37.70 %	244
BRADLEY	6	60.00 %	4	40.00 %	10
CALHOUN	5	100.00 %	0	0.00 %	5
CARROLL	80	43.48 %	104	56.52 %	184
CHICOT	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
CLARK	31	68.89 %	14	31.11 %	45
CLAY	6	100.00 %	0	0.00 %	6
CLEBURNE	61	49.19 %	63	50.81 %	124
CLEVELAND	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
COLUMBIA	20	58.82 %	14	41.18 %	34
CONWAY	43	66.15 %	22	33.85 %	65
CRAIGHEAD	62	66.67 %	31	33.33 %	93
CRAWFORD	140	52.24 %	128	47.76 %	268
CRITTENDEN	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
CROSS	3	75.00 %	1	25.00 %	4
DALLAS	4	80.00 %	1	20.00 %	5
DESHA	4	66.67 %	2	33.33 %	6
DREW	6	66.67 %	3	33.33 %	9
FAULKNER	107	62.94 %	63	37.06 %	170
FRANKLIN	45	47.87 %	49	52.13 %	94
FULTON	22	50.00 %	22	50.00 %	44
GARLAND	745	62.19 %	453	37.81 %	1198
GRANT	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
GREENE	13	48.15 %	14	51.85 %	27
HEMPSTEAD	7	46.67 %	8	53.33 %	15
HOT SPRING	10	58.82 %	7	41.18 %	17
HOWARD	2	40.00 %	3	60.00 %	5
INDEPENDENCE	157	44.23 %	198	55.77 %	355
IZARD	69	49.64 %	70	50.36 %	139
JACKSON	8	53.33 %	7	46.67 %	15
JEFFERSON	47	73.44 %	17	26.56 %	64
JOHNSON	84	55.63 %	67	44.37 %	151
LAFAYETTE	3	75.00 %	1	25.00 %	4
LAWRENCE	7	41.18 %	10	58.82 %	17
LEE	5	45.45 %	6	54.55 %	11
LINCOLN	3	100.00 %	0	0.00 %	3
LITTLE RIVER	5	71.43 %	2	28.57 %	7
LOGAN	46	60.53 %	30	39.47 %	76
LONOKE	32	52.46 %	29	47.54 %	61
MADISON	143	61.51 %	102	38.49 %	265
MARION	81	49.69 %	82	50.31 %	163
MILLER	46	74.19 %	16	25.81 %	62
MISSISSIPPI	9	81.82 %	2	18.18 %	11
MONROE	13	100.00 %	0	0.00 %	13
MONTGOMERY	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
NEVADA	10	43.48 %	13	56.52 %	23
NEWTON	120	54.55 %	100	45.45 %	220
OUACHITA	15	57.69 %	11	42.31 %	26
PERRY	14	73.68 %	5	26.32 %	19
PHILLIPS	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
PIKE	8	61.54 %	5	38.46 %	13
POINSETT	12	85.71 %	2	14.29 %	14
POLK	55	47.83 %	60	52.17 %	115
POPE	74	75.51 %	24	24.49 %	98
PRAIRIE	16	61.54 %	10	38.46 %	26
PULASKI	1862	52.91 %	1657	47.09 %	3519
RANDOLPH	21	67.74 %	10	32.26 %	31
ST. FRANCIS	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
SALINE	70	48.28 %	75	51.72 %	145
SCOTT	17	40.48 %	25	59.52 %	42
SEARCY	182	42.62 %	245	57.38 %	427
SEBASTIAN	1002	43.25 %	1315	56.75 %	2317
SEVIER	12	75.00 %	4	25.00 %	16
SHARP	88	37.45 %	147	62.55 %	235
STONE	3	23.08 %	10	76.92 %	13
UNION	48	55.81 %	38	44.19 %	86
VAN BUREN	57	48.72 %	60	51.28 %	117
WASHINGTON	682	49.22 %	683	50.78 %	1345
WHITE	111	55.22 %	90	44.78 %	201
WOODRUFF	-- NO ELECTION RESULTS REPORTED FROM THIS COUNTY				
YELL	12	63.16 %	7	36.84 %	19
	10164	53.02 %	9007	46.98 %	19171

BEST AVAILABLE COPY

1990 PRIMARY - LT. GOVERNOR- REPUBLICAN

	RALPH P. FORBES		KENNETH "MUSKIE" HARRIS		
COUNTY	VOTES	%	VOTES	%	TOTAL VOTES
ARKANSAS	160	48.48	95	28.79	330
ASHLEY	19	38.78	13	26.53	49
BAXTER	1,195	55.27	652	30.16	2,162
BENTON	4,118	60.22	1,698	24.83	6,838
BOONE	495	55.37	284	31.77	894
BRADLEY	25	40.98	24	39.34	61
CALHOUN	12	36.36	15	45.45	33
CARROLL	211	54.81	113	29.35	385
CHICOT	32	40.51	30	37.97	79
CLARK	143	52.19	86	31.39	274
CLAY	28	57.14	12	24.49	49
CLEBURNE	330	56.70	169	29.04	582
CLEVELAND	22	48.89	16	35.56	45
COLUMBIA	374	49.73	223	29.65	752
CONWAY	100	42.74	91	38.89	234
CRAIGHEAD	292	60.08	148	30.45	486
CRAWFORD	357	55.78	190	29.69	640
CRITTENDEN	81	50.94	64	40.25	159
CROSS	31	58.49	16	30.19	53
DALLAS	26	68.42	7	18.42	38
DESHA	34	41.46	24	29.27	82
DREW	72	45.86	41	26.11	157
FAULKNER	841	41.12	619	30.27	2,045
FRANKLIN	93	50.27	59	31.89	185
FULTON	33	66.00	9	18.00	50
GARLAND	2,112	50.41	1,302	31.07	4,190
GRANT	91	47.89	74	38.95	190
GREENE	64	60.38	29	27.36	106
HEMPSTEAD	86	47.78	62	34.44	180
HOT SPRING	148	51.57	86	29.97	287
HOWARD	34	47.89	27	38.03	71
INDEPENDENCE	184	52.57	116	33.14	350
IZARD	102	56.64	77	26.92	286
JACKSON	101	48.56	77	37.02	208
JEFFERSON	674	52.49	382	29.75	1,284
JOHNSON	264	51.66	158	30.92	511
LAFAYETTE	28	71.79	4	10.26	39
LAWRENCE	48	54.55	35	39.77	88
LEE	7	63.64	3	27.27	11
LINCOLN	24	55.81	12	27.91	43
LITTLE RIVER	6	54.55	3	27.27	11
LOGAN	208	58.92	105	29.75	353
LONOKE	592	50.68	370	31.68	1,168
MADISON	282	63.09	110	24.61	447
MARION	277	50.92	188	34.56	544
MILLER	239	50.10	102	21.38	477
MISSISSIPPI	83	61.03	34	25.00	136
MONROE	363	54.50	185	27.78	666
MONTGOMERY	133	63.94	49	23.56	208
NEVADA	15	45.45	15	45.45	33
NEWTON	235	71.21	60	18.18	330
OUACHITA	156	55.12	74	26.15	283
PERRY	74	40.88	59	32.60	181
PHILLIPS	197	58.98	77	23.05	334
PIKE	85	52.15	48	29.45	163
POINSETT	13	32.50	24	60.00	40
POLK	168	57.73	75	25.77	291
POPE	577	41.51	533	38.35	1,390
PRAIRIE	103	41.70	97	39.27	247
PULASKI	7,364	33.50	10,472	47.64	21,982
RANDOLPH	24	35.29	39	57.35	68
SALINE	1,551	44.47	1,294	37.10	3,488
SCOTT	23	63.89	8	22.22	36
SEARCY	653	61.78	282	26.68	1,057
SEBASTIAN	2,669	55.18	1,331	27.52	4,837
SEVIER	59	41.55	52	36.62	142
SHARP	236	61.78	98	25.65	382
ST. FRANCIS	21	55.26	12	31.58	38
STONE	53	63.10	11	13.10	84
UNION	256	42.45	167	27.69	603
VAN BUREN	261	52.83	160	32.39	494
WASHINGTON	2,040	54.57	1,067	28.54	3,738
WHITE	907	47.34	622	32.46	1,916
WOODRUFF	8	61.54	1	7.69	13
YELL	98	51.85	66	34.92	189
COUNTIES: 75					
TOTAL:	33,180		25,032		70,775 *
AVERAGE:		46.88		35.37	

* TOTAL AS CERTIFIED BY THE REPUBLICAN PARTY
SECRETARY OF STATE CALCULATED TOTAL 70,875

1992 ARKANSAS GENERAL ELECTION - U.S. REPRESENTATIVE 3RD DISTRICT

COUNTY	JOHN VANWINKLE (D) VOTES	%	TIM HUTCHINSON (R) VOTES	%	TOTAL VOTES
BAXTER	6,504	47.65	6,416	47.00	13,650
BENTON	16,131	37.22	26,101	60.23	43,337
BOONE	6,120	46.12	6,793	51.19	13,271
CARROLL	4,247	48.56	4,218	48.23	8,746
CRAWFORD	7,419	46.83	7,968	50.29	15,843
FRANKLIN	3,956	58.91	2,637	39.27	6,715
JOHNSON	4,322	56.79	3,103	40.77	7,611
LOGAN	4,381	52.56	3,732	44.77	8,336
MADISON	2,815	53.32	2,372	44.93	5,279
MARION	2,623	49.05	2,410	45.06	5,348
NEWTON	2,014	51.57	1,760	45.07	3,905
POLK	3,761	52.47	3,206	44.73	7,168
POPE	8,954	48.60	9,021	48.96	18,425
SCOTT	2,645	57.46	1,865	40.52	4,603
SEBASTIAN	18,740	47.13	20,225	50.86	39,764
WASHINGTON	23,143	48.73	23,468	49.41	47,493
COUNTIES: 16					
TOTAL:	117,775		125,295		249,494
AVERAGE:		47.20		50.22	

COUNTY	RALPH FORBES (I) VOTES	%	REX PETTY (W) VOTES	%	TOTAL VOTES
BAXTER	730	5.35	0	0.00	13,650
BENTON	1,105	2.55	0	0.00	43,337
BOONE	358	2.70	0	0.00	13,271
CARROLL	281	3.21	0	0.00	8,746
CRAWFORD	456	2.88	0	0.00	15,843
FRANKLIN	122	1.82	0	0.00	6,715
JOHNSON	186	2.44	0	0.00	7,611
LOGAN	211	2.53	12	0.14	8,336
MADISON	92	1.74	0	0.00	5,279
MARION	315	5.89	0	0.00	5,348
NEWTON	131	3.35	0	0.00	3,905
POLK	201	2.80	0	0.00	7,168
POPE	450	2.44	0	0.00	18,425
SCOTT	93	2.02	0	0.00	4,603
SEBASTIAN	799	2.01	0	0.00	39,764
WASHINGTON	799	1.68	83	0.17	47,493
COUNTIES: 16					
TOTAL:	6,329		95		249,494
AVERAGE:		2.54		0.04	

1992 ARKANSAS GENERAL ELECTION - U. S. PRESIDENT

	JOHN HAGELIN (G)		ROSS PEROT (G)		
COUNTY	VOTES	%	VOTES	%	TOTAL VOTES
ARKANSAS	6	0.08	639	8.01	7,980
ASHLEY	6	0.06	931	9.73	9,567
BAXTER	15	0.10	2,938	18.68	15,732
BENTON	21	0.05	6,128	14.16	43,279
BOONE	13	0.09	2,079	14.40	14,437
BRADLEY	2	0.04	391	8.08	4,837
CALHOUN	2	0.07	257	9.51	2,702
CARROLL	10	0.11	1,500	16.94	8,857
CHICOT	0	0.00	347	6.81	5,099
CLARK	3	0.03	714	8.00	8,922
CLAY	4	0.06	568	8.02	7,080
CLEBURNE	10	0.10	1,263	12.66	9,980
CLEVELAND	11	0.33	337	9.98	3,378
COLUMBIA	13	0.13	1,090	11.10	9,819
CONWAY	8	0.09	803	9.47	8,481
CRAIGHEAD	10	0.04	2,274	8.88	25,596
CRAWFORD	30	0.19	2,442	15.11	16,165
CRITTENDEN	41	0.24	848	4.96	17,108
CROSS	8	0.11	602	8.62	6,986
DALLAS	3	0.08	345	8.79	3,925
DESHA	9	0.16	392	6.97	5,621
DREW	2	0.03	596	9.46	6,298
FAULKNER	14	0.06	2,437	9.66	25,215
FRANKLIN	8	0.12	987	14.65	6,736
FULTON	8	0.17	631	13.32	4,736
GARLAND	67	0.19	3,475	9.65	35,995
GRANT	2	0.03	702	11.33	6,198
GREENE	13	0.11	1,213	9.84	12,322
HEMPSTEAD	4	0.04	1,022	11.45	8,922
HOT SPRING	9	0.08	1,209	11.39	10,616
HOWARD	3	0.06	466	9.37	4,975
INDEPENDENCE	6	0.05	1,444	11.25	12,840
IZARD	5	0.09	606	10.84	5,588
JACKSON	11	0.15	673	8.94	7,524
JEFFERSON	18	0.06	2,067	6.52	31,692
JOHNSON	4	0.05	1,013	13.37	7,578
LAFAYETTE	2	0.05	504	12.67	3,979
LAWRENCE	4	0.06	636	9.18	6,929
LEE	4	0.08	308	6.08	5,066
LINCOLN	2	0.05	390	8.97	4,347
LITTLE RIVER	3	0.05	890	15.56	5,718
LOGAN	5	0.06	1,220	14.04	8,687
LONOKE	4	0.03	1,554	9.82	15,824
MADISON	3	0.06	598	11.33	5,277
MARION	5	0.08	1,327	21.25	6,245
MILLER	2	0.01	2,249	15.38	14,623
MISSISSIPPI	6	0.04	981	6.15	15,962
MONROE	2	0.05	355	8.31	4,272
MONTGOMERY	4	0.11	576	15.52	3,712
NEVADA	7	0.18	455	11.52	3,948
NEWTON	12	0.29	608	14.67	4,144
OUACHITA	6	0.05	1,238	9.97	12,415
PERRY	1	0.03	412	11.76	3,504
PHILLIPS	3	0.03	634	6.45	9,837
PIKE	2	0.05	472	11.15	4,232
POINSETT	6	0.07	761	8.88	8,571
POLK	11	0.15	1,225	16.97	7,217
POPE	11	0.06	1,989	11.14	17,862
PRAIRIE	0	0.00	434	10.97	3,956
PULASKI	74	0.05	8,751	6.39	136,957
RANDOLPH	7	0.11	578	9.15	6,314
SALINE	14	0.05	2,751	10.72	25,661
SCOTT	6	0.13	610	13.37	4,562
SEARCY	4	0.10	503	12.63	3,984
SEBASTIAN	13	0.03	6,023	15.19	39,659
SEVIER	8	0.16	643	12.83	5,011
SHARP	7	0.10	921	12.80	7,196
ST. FRANCIS	8	0.08	766	7.20	10,635
STONE	8	0.16	697	13.83	5,039
UNION	21	0.11	1,919	10.33	18,580
VAN BUREN	7	0.10	888	12.06	7,361
WASHINGTON	28	0.06	5,304	11.08	47,880
WHITE	46	0.21	2,366	10.97	21,563
WOODRUFF	2	0.06	227	6.49	3,495
YELL	7	0.09	940	12.30	7,643
COUNTIES: 75					
TOTAL:	764		99,132		950,653
AVERAGE:		0.08		10.43	

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ARKANSAS
DEMOCRAT GAZETTE
OCT. 22, 1992

Thornton

• Continued from Page 1A

year. He said he might seek the Senate seat being given up by Sen. David Pryor, D-Ark. But most political analysts think it will take more than $2 million to mount a winning campaign. And they doubt that Thornton wants to take on such a fund-raising burden in the waning years of his political career, much less be the target of attacks in what promises to be a rough-and-tumble campaign for the Democratic nomination and against a Republican nominee.

It is more likely, the congressman's friends say, that Thornton will run for chief justice of the Arkansas Supreme Court. That job is being given up by Jack Holt Jr. Whomever Gov. Jim Guy Tucker appoints to fill the position through the end of 1996 will be ineligible to run for a full term.

Thornton has built one of the state's most impressive resumes: graduate of Yale University; Arkansas' attorney general in 1971-72; member of Congress from the 4th District from 1973-78; head of the Joint Educational Consortium at Arkadelphia in 1979; president of Arkansas State University at Jonesboro from 1980-84; president of the University of Arkansas System from 1984-89; member of Congress from the 2nd District since 1991.

"Ray is sort of like George Bush when it comes to being a collector of titles," one observer of Arkansas politics said last week. "Chief justice of the Arkansas Supreme Court would be a nice title for him to end with."

It would not be unprecedented for a member of Congress to wind up on his state's highest court. By the same token, former judges sometimes have taken great pride in being referred to as "judge" even after coming to Congress. One example is Sen. Howell Heflin, D-Ala., who served from 1971-76 as chief justice of the Alabama Supreme Court. Heflin prefers "Judge Heflin" to "Senator Heflin."

For now, Thornton is being coy. He gives few clues as to whether he wants to be "Sen. Thornton," "Judge Thornton" or out of politics entirely.

When he ran unsuccessfully for the Senate in 1978 — finishing third in the Democratic primary behind then-Gov. Pryor and then-2nd District Rep. Tucker — Thornton used the slogan, "I Trust Ray."

He has attempted to build on that reputation through the years. Thornton seemed genuinely embarrassed in 1991 when it was revealed that he had one overdraft on the House bank — for $18. Never mind that the person who ranked first on the overdraft list was an Arkansan, former Rep. Tommy Robinson. Never mind that two other House members from Arkansas, Beryl Anthony Jr. and Bill Alexander, ranked among the top 25 congressmen in the number of checks bounced.

On airline flights to and from Washington, Thornton has been known to spot constituents and explain to them that the taxpayers weren't footing the bill for his first-class seat. He has gone to great lengths to explain that he received a free upgrade for the number of miles traveled.

In an age of flash — an era of news conferences and press releases — it is questionable if a man who rarely holds news conferences, doesn't often grant interviews and sends out few press releases would want to be part of one of the nation's highest-profile Senate races.

"Maybe I need to go back to being Cowboy Ray Thornton," the congressman said during a recent interview in his Capitol Hill office.

Thornton had returned from military service in Korea in 1954 and entered law school at the University of Arkansas at Fayetteville. He decided to run for the presidency of the Student Government Association.

"I pulled my guitar out and began picking and singing all over campus," he said. "We attracted good crowds wherever we went, and I won by an almost 2-to-1 margin. I have not played my guitar in a campaign since then. But if politics keep changing, I might have to."

* * *

Certainly, Thornton is not known as an entertainer.

"I do my work without hype," he said.

He has chosen to ign
ponents, a strategy
worked the past three

When Thornton dec
turn to politics in 19
dozen years in academ
pended on that image
of integrity. Tucker seri
sidered running that ye
old 2nd District seat, w
being given up by Robi

Robinson, the merc
mer Pulaski County sh
had switched from th
cratic Party to the GOI
1989, conducted an uns
1990 campaign for the
bernatorial nomination.

When Tucker decide
for governor rather than
(he later dropped out and
the lieutenant governor's
left Thornton without a
challenger. Due to Thornt
id reputation and the
available from his billion
cles — W.R. "Witt" a
Stephens — Republican
hard time recruiting a c
for the open seat.

State Rep. Ron Fuller
Rock entered the race.
dropped out when contr
failed to materialize. Fin
tional Republican Congr
Committee and Arkansas
lican Party officials conv
freshman state represent
millionaire Little Rock b
man Jim Keet — to battle
ton.

Thornton refused to
Keet, claiming that "the
campaign is a debate." In
rarely mentioned his opp
name. The Democrat won
percent of the vote.

In 1992, Thornton wa
lenged by an unknown R
can from Benton, Dennis
who spent just $6,212. T
cumbent was re-elected
percent of the vote.

Last year, the going wa
tougher. Thornton had
the senior member of the
sas House delegation fo
the 1992 retirement of Rep
Rep. John Paul Hammer
and the 1992 Democratic p
defeats of Alexander and
ny. Again, no Democra
against him. Again, Repul
were unable to attract an
nent who could raise mon

But a feisty former radi
show host, Bill Powell of

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175

Little Rock, rode the GOP tide and wound up with 43 percent of the vote. Thornton claimed his 57 percent performance did not concern him even though his opponent was underfinanced and unknown. He noted the large number of Democratic congressmen who did not return at all for the 104th Congress.

Others, however, perceived it as a sign of vulnerability and began to make plans to challenge Thornton in 1996.

"The problem is you can never prevent someone from tossing out all kinds of charges against you," Thornton said. "My record speaks for itself. Had we debated, it would have been about me rather than the issues. People already know my record."

Thornton said he was advised last fall to "go negative and take him out. But that's not my style. I was very gratified with 57 percent."

He insisted that it's too early to announce what, if any, office he will seek next year. Yet he admitted that it won't be an advantage to run as a congressional incumbent given the current political atmosphere.

Why the cynicism on the part of voters?

Thornton has a theory: "During the 1980s, Republicans were in control of the White House and Democrats mostly were in control of Congress. Members of Congress spent their time bashing the executive branch. At the same time, Republican presidents ran against Congress. People lost confidence in both branches."

All the while, Thornton said, the Washington press corps focused on the negative.

"I understand the dynamics," he said. "When there's a fight going on, the press will show up. The fights get all the ink, and people get the idea that government is not working. Those stories, though, ignore the many parts of government that *are* working."

* * *

Thornton has known President Clinton since Clinton began his political career in Arkansas with an unsuccessful race against Hammerschmidt in 1974. But in the months since Clinton took office in January 1993, the congressman has kept his distance from the administration.

Thornton's most notable floor vote came in August 1993 when he waited until the last moment to vote against Clinton's five-year budget plan. The bill passed by only one vote.

Thornton said he opposed a gasoline tax increase in the measure and had notified the White House of his opposition well in advance of the vote. But White House officials said privately that Thornton had assured the president he would back the plan if his support was needed for passage.

With his "no" vote, Thornton angered both sides. Clinton supporters were mad that he did not stick with the president from his home state on the most important vote up to that point in the administration. Those opposed to the president, meanwhile, said that if Thornton were truly opposed to the budget package, he should have spoken out in advance and not waited until the clock had run out to vote.

Thornton later supported Clinton on two major trade accords, the North American Free Trade Agreement and the General Agreement on Tariffs and Trade.

For much of his first two terms from the 2nd District, Thornton promoted his Marshall Plan for America, calling for an investment of 2 percent of the gross national product (more than $100 billion) annually in rebuilding the nation's infrastructure and economy. He also maintained an intense interest in scientific and technological issues.

This year, Thornton has had to adjust to being a member of the minority. While careful to note that he agrees with the need for spending cuts, he continues to push for an "investment in the future."

"As part of the budget process, we ought to make a distinction between money needed for day-to-day operations and money invested in the future," Thornton said. "The day-to-day operations budget should be balanced."

As examples of past "investments in the future," he mentioned the GI Bill and the interstate highway system.

Thornton is proud that he retained his seat on the House Appropriations Committee following the Republican takeover, noting that he is the "only Democratic member of Congress elected in 1990 or later who is on one of the exclusive committees. People respect my committee work. Because of that, I was a survivor."

He said he can still be "effective in representing my constituents" as a minority member, listing Hammerschmidt as an example of a congressman who was able to get things accomplished for constituents in the minority "without being flashy."

Thornton supported parts of the GOP's Contract With America but he said a mistake was made in rushing through a crowded agenda "in a short period of time without the benefit of proper hearings."

"The reason we have hearings is to avoid mistakes," he said. "The speed with which we have done things this year has been the biggest flaw. I also have problems with the word 'contract.' I term it an 'agenda.' The only contract any member of the House has is with the 600,000 people who allow him to serve."

Such proclamations by Thornton can sound flowery. They're the words of an old-fashioned politician, not a sound-bite wizard of the 1990s. Thornton thinks there's still a place for his deliberate style.

"When you have a tragedy like we had in Oklahoma City last month, it gets you back to your roots," he said. "I think the American people are hungry for cooler heads and less heated rhetoric."

He said he is "old enough to remember when the Ku Klux Klan was a force" and thus not alarmed by the current focus on private militias.

"The right of people to express their opinions must be protected," Thornton said. "Our job is to stop those who want to move from thoughts to acts of violence."

As he continues his work on the Appropriations Committee and for the folks back home, the question among political animals in Arkansas is whether Thornton will run for the Supreme Court, the Senate or call it a career.

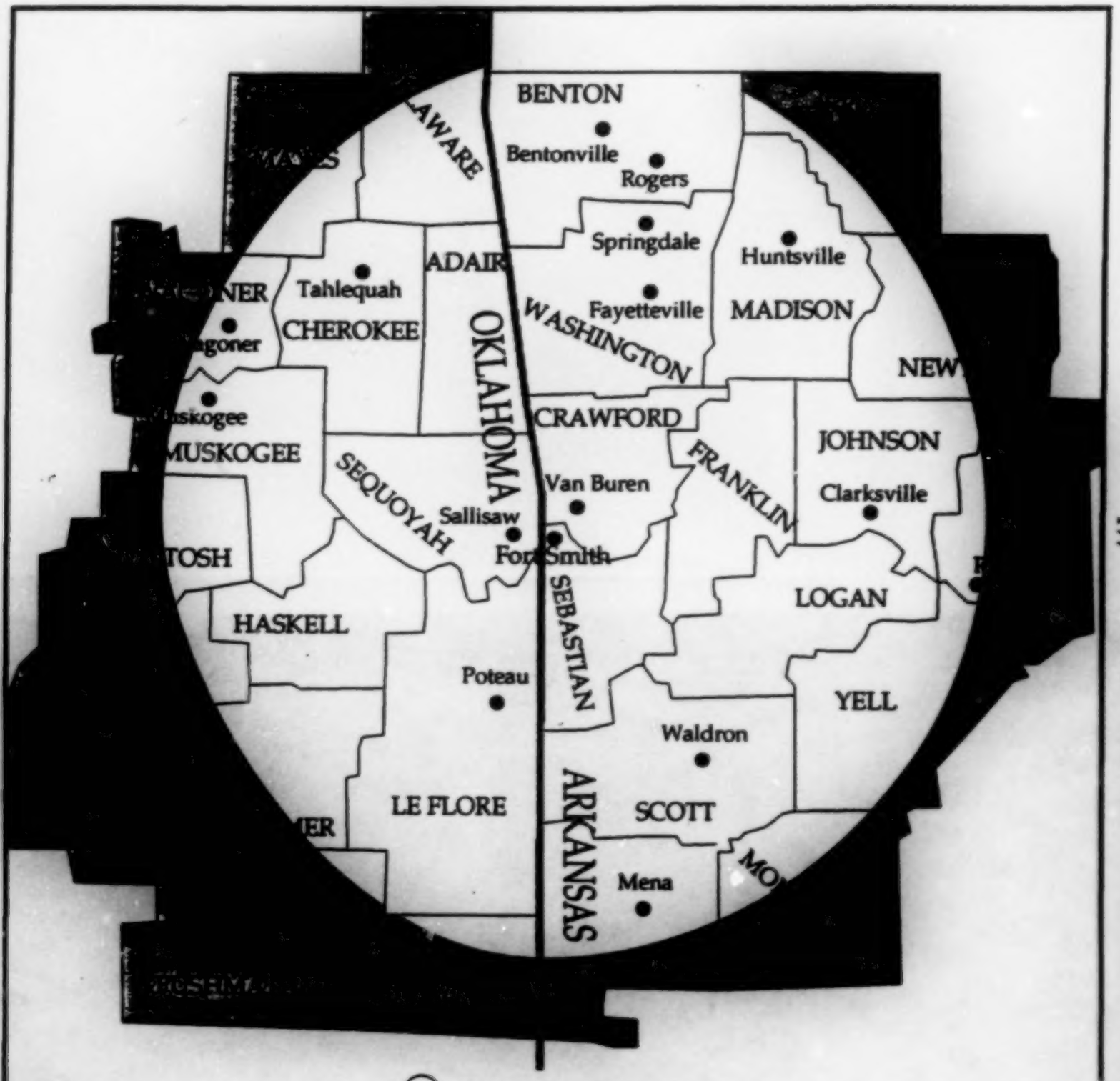
As summer approaches, the man who has been a part of the state's establishment for a quarter of a century is giving clues as to his intentions

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PLAINTIFFS EXHIBIT 25

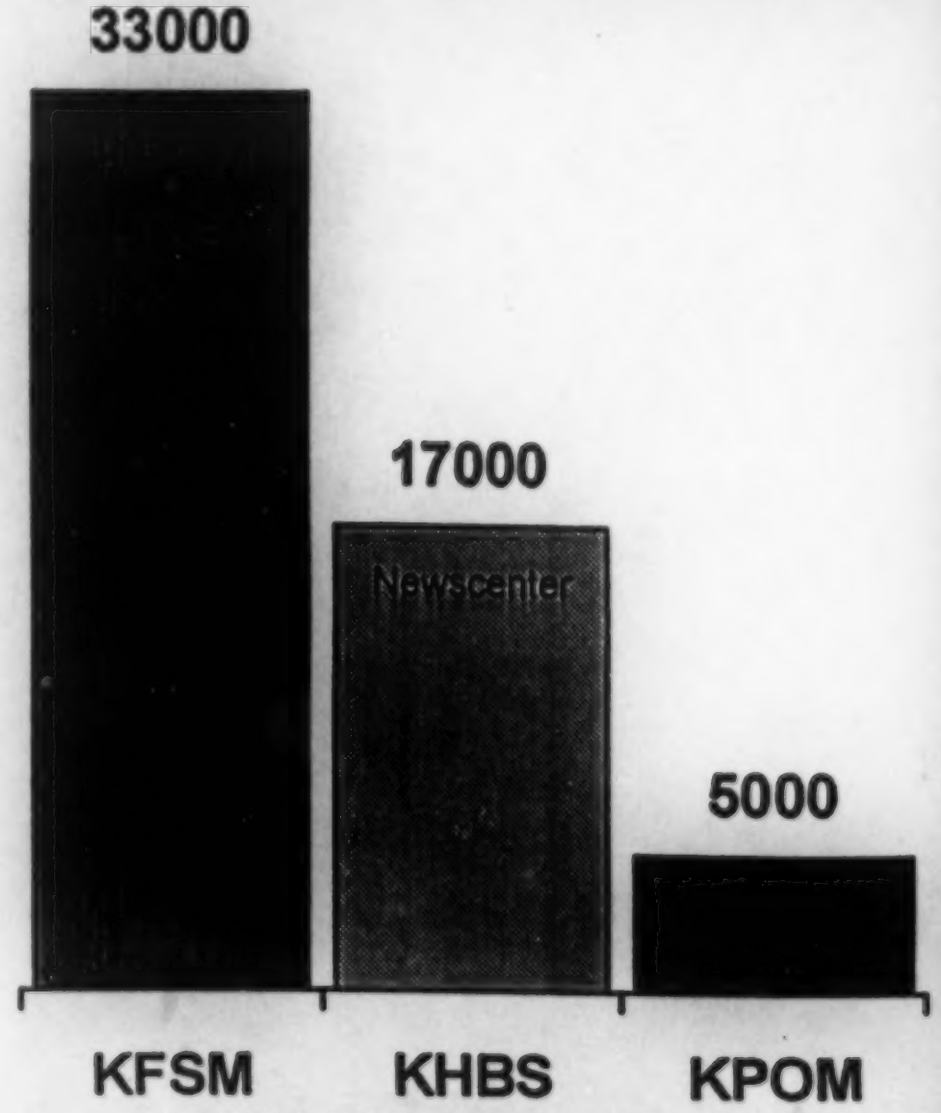
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Source: Nielsen November 1994

PLAINTIFFS EXHIBIT
26

Where Local News Comes First!

Organizational Structure of AETC and AETN

As of October, 1992

The Governor
(Bill Clinton)

|

Eight Members of the Arkansas ETV Commission
(Appointed by the Governor)

|

Susan Howarth
Executive Director
(Employed by Commission)

|

Larry Foley
Associate Director

Carole Adornetto
Production Director

|

Amy Oliver
Production Manager
(Employee of AETN Foundation)

DEFENDANT'S EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2722WAFS

Ralph P. Forbes *
*
Appellant, *
*
v. *
*
The Arkansas Education *
Television Commission, et al. *
*
Appellees. *

Filed: November 20, 1995

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS FORTH
SMITH DIVISION

BRIEF FOR APPELLEES

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SUMMARY OF THE CASE; REQUEST FOR ORAL ARGUMENT

In October, 1992, the Arkansas Educational Television Network ("AETN") broadcast a debate between the major party candidates for the Third District U.S. House seat in Arkansas. Ralph Forbes, a fringe candidate, was not invited to participate. In Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423 (8th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 500 (1994), cert. denied, 115 S. Ct. 1962 (1995), this Court ordered a trial of Forbes' First Amendment claim against AETN. A jury found for AETN, and Forbes now appeals.

This appeal reopens the issue of whether, and under what circumstances, a state-entity public broadcast licensee's programming judgments are protected under the First Amendment. AETN contends that this Court may not delve into its editorial decisions – even if AETN denied Forbes a forum for his views – unless AETN's editorial processes were tainted by political interference. (The jury found that no political interference occurred.) AETN's defense runs counter to this Court's en banc holding that AETN "must provide a rational and viewpoint-neutral justification" for its editorial decisions. (The en banc holding also is counter to decisions of other circuits.)

This case involves complicated Communications Act and First Amendment analysis. AETN has suggested consideration en banc, and believes that oral argument of at least 30 minutes per side is necessary.

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W. Canby, "The First Amendment and the State As Editor: Implications for Public Broadcasting," 52 Texas L. Rev. 1123 (1974) 32

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Under the First Amendment and the Communications Act, and absent political interference from the state, does a state-entity public broadcast licensee have the same editorial prerogatives as non-state-entity public broadcast licensees and commercial licensees, so that its editorial processes, as carried out by the professional editors charged with making day-to-day programming decisions, are protected from oversight by the judiciary?

2. Should this Court modify its decision in Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423, 1430 (8th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 500 (1994), cert. denied, 115 S. Ct. 1962 (1995), holding that a state-entity public broadcast licensee "must provide a rational and viewpoint-neutral justification" for editorial decisions affecting the broadcast of a political debate, when no political interference by the state is found?

3. Did the District Court correctly instruct the jury to find whether political pressure influenced the Arkansas Educational Television Network's decision not to invite a candidate to a broadcast debate?

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEDURAL HISTORY

In October 1992, the Arkansas Educational Television Commission ("AETC" or the "Commission") arranged to conduct and broadcast a debate between the Republican and Democratic candidates for the office of United States Representative for the Third District of Arkansas. By letter dated August 24, 1992 to AETC's Executive Director Susan Howarth, Ralph P. Forbes notified AETC that he was an independent candidate for U.S. Representative from the Third District of Arkansas and requested to be included on equal terms in the debate between his opponents. Forbes Appendix ("F.App.") A3(a). On September 4, 1992, Howarth responded by letter stating that, under Section 315(a) of the Communications Act, 47 U.S.C. §315(a), as interpreted by the FCC and the courts, debates were exempt from equal opportunities, and that AETC had made a bona fide journalistic judgment that its viewers would be best served by limiting the debate to nominees of the two major parties. AETN Tr. Exh. 12.

On October 19, 1992, three days before the debate, Forbes sued AETC, its members, its Executive Director and others in the United States District Court for the Western District of Arkansas. He alleged that, because he was qualified for the ballot as an independent candidate, he had a right to be included in the debate. Forbes alleged that AETC's decision not to invite him to the debate violated the Civil Rights Act, 42 U.S.C. §1981 et seq., and his First Amendment rights. He sought declaratory and injunctive relief and compensatory and punitive damages.

Forbes' motion for a preliminary injunction to mandate his inclusion in the debate was denied by the District Court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of this Court denied Forbes' request for an injunction pending appeal. The debate was broadcast without Forbes' participation on October 22, 1992.

One week after the election, the AETN Defendants filed a motion to dismiss the complaint under Rule 12(b)(6), Fed.R.Civ. P.12(b)(6). The District Court granted the AETN Defendants' motion and dismissed the complaint on December 16, 1992.

A panel of this Court denied Forbes' request for rehearing on the issue of preliminary relief on December 22, 1992. On April 28, 1994, this Court, en banc, affirmed in part and reversed in part the District Court's decision granting the AETN Defendants' motion to dismiss. Forbes v. Arkansas Educ. Television Communication Network Found., 22 F.3d 1423 (8th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 500 (1994), cert. denied, 115 S. Ct. 1962 (1995). The Court reversed concerning Forbes' First Amendment claim, holding that, "Forbes did allege a First Amendment violation well enough to survive a motion to dismiss." Id. at 1428.

On September 16, 1994, the AETN Defendants filed with the United States Supreme Court a petition for a writ of certiorari, which was denied on November 7, 1994. On September 19, 1994, Forbes filed a petition for a writ of certiorari, which was denied on May 15, 1995.

Trial began on Forbes' First Amendment claim on June 5, 1995. On June 7, 1995, the jury returned a verdict in favor of the AETN Defendants. Responding to a special verdict form, the jury found that (1) AETN's decision not to invite Forbes to the debate was not influenced in any way by political pressure, and (2) the decision was not made because of objections or opposition to his views. The District Court entered judgment in favor of the AETN Defendants on June 7, 1995.

Forbes filed a notice of appeal. On August 4, 1995, the AETN Defendants suggested that this Court schedule an initial hearing en banc. By Order dated August 9, 1995, the Court referred the suggestion to the panel hearing this case. The suggestion is pending.

II. STATEMENT OF FACTS

A. The Arkansas Educational Television Commission and The Arkansas Educational Television Network

The Arkansas Educational Television Commission is an agency of the State of Arkansas, organized for the purpose of making the benefits of educational television available to the people of Arkansas. Ark. Code Ann. §§ 6-3-101, 6-3-105(a) (Michie 1994). AETC has eight members appointed by the Governor of Arkansas with the advice and consent of the state Senate. Ark. Code Ann. § 6-3-102(a)(1), (b)(1). The members may not hold any other state or federal office, or hold employment paid in whole or part by funds derived from tax sources, except for educators in the state's public schools or institutions of higher learning. Ark. Code Ann. § 6-3-102(a)(3). The members serve eight-year terms and may be removed only for good cause. Ark. Code Ann. §§ 6-3-102(b)(1), 25-16-804(b)(1).

AETC's Executive Director is defendant Susan Howarth. Tr. Trans. 178 (S. Howarth)[1/]. As Executive Director, Ms. Howarth is an employee of the Commission and the executive in overall charge of the Arkansas Educational Television Network ("AETN" or the "Network"). Tr. Trans. 184 (S. Howarth). The Network's headquarters is in Conway, Arkansas, where network programming originates. Tr. Trans. 182 (S. Howarth). The Network also consists of the following five stations: KETS, Little Rock; KEMV, Mountain View; KETG, Arkadelphia; KAFT, Fayetteville; and KTEJ, Jonesboro. See Tr. Trans. 179, 182 (S. Howarth). All five stations are noncommercial educational television stations licensed by the Federal Communications Commission (the "FCC") to AETC. Tr. Trans. 179, 183 (S. Howarth).

There is also an organization called the Arkansas Educational Telecommunications Network Foundation (the "Foundation"), a tax-

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1/ References to "Tr. Trans." refer to the transcript of the jury trial held June 5-7, 1995.

exempt entity that supports the Network. Tr. Trans. 184, 186 (S. Howarth). Ms. Howarth is also the Executive Director of the Foundation. See Tr. Trans. 184 (S. Howarth).

B. Programming Policy Statement for AETN

Although AETN is state-owned, it is organized so that its programming decisions are free from political pressure that might originate with members of the executive or legislative branches of state government. The eight members of AETC appoint an Executive Director. Ark. Code Ann. § 6-3-104. The June 1988 "Programming Policy Statement for AETN" that the Commission adopted and follows, Tr. Trans. 187, 194 (S. Howarth), declares that the Commission delegates to its Executive Director the authority to make programming decisions for the Network. AETN Appendix ("A.App.") 44 (Tab 7). In other words, the Executive Director of the Commission is the Network's "editor-in-chief." A.App. 44; Tr. Trans. 184 (S. Howarth). The Executive Director "may delegate the exercise of this authority to professional staff based on informed programming discretion. . . ." A.App. 44.

The Commission's Programming Policy Statement demonstrates that the purpose of AETN is to provide educational and other valuable programming to the people of Arkansas:

> AETN furthers the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time.
>
> * * *
>
> Locally-produced programs relevant and responsive to Arkansas needs, problems, issues, and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state.

A.App. 46. The Programming Policy Statement also describes how the structure of AETN insulates the editorial decisions of AETN's professional journalists and programmers:

> AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources.
>
> AETN bases its public service programming on its value in the marketplace of ideas; not on financial considerations or commercial pressures.

A.App. 45.

C. Statement of Principles of Editorial Integrity in Public Broadcasting

The Commission also follows the "Statement of Principles of Editorial Integrity in Public Broadcasting" adopted by AETC in June 1988. Tr. Trans. 194 (S. Howarth). This document was developed at a conference "convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in light of past legal decisions and legislative actions." A.App. 41 (Tab 6). The conferees, including representatives of AETC, were concerned about the sensitive constitutional issues that can arise when state-owned broadcasting stations exercise their editorial discretion. They drafted the Statement of Principles of Editorial Integrity to "help to guarantee public broadcasting's editorial integrity in the future." Id. Editorial integrity in public broadcast programming is defined in the document as "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." Id. at 34.

The Statement of Principles of Editorial Integrity declares:

> The process of developing programs . . . must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

A.App. 40. AETN, as a signatory to the Principles of Editorial Integrity, partitions its broadcasting operations so that they are editorially independent of the state's political and administrative apparatus. AETN's journalistic process is deliberately partitioned from the political and administrative processes of the state.

D. The 1992 Federal Elections

1. AETN's Decision to Produce Debates for the 1992 Federal Elections and Its Initial Planning of the Debates

In fulfillment of its purpose to provide valuable programming to the people of Arkansas about current issues, AETN produced programming to cover the 1992 federal elections. Planning began as early as May 1992, when Carole Adornetto, AETN's Production Director, instructed Amy Oliver Barnes,[2/] the Production Manager, to work with Bill Simmons, Chief of the Associated Press (the "AP") in Little Rock, to produce five election debates. Tr. Trans. 195 (S. Howarth); Tr. Trans. 292 (A. Oliver); AETN Tr. Exh. 15 (Memo. dated May 12, 1992 from Carole Adornetto to Amy Oliver). Mr. Simmons, a respected journalist, acted as a journalistic consultant to AETN. AETN worked with Mr. Simmons because he "brought so much credibility" and because "he had brought a lot to the process

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2/ Ms. Barnes worked professionally under the name Amy Oliver, and is referred to in this Brief as Ms. Oliver.

because of his -- his background and his experience." Tr. Trans. 195-96 (S. Howarth). Ms. Oliver was responsible for making a recommendation, through Ms. Adornetto, to Ms. Howarth about the conduct of the debates. Tr. Trans. 195 (S. Howarth).

AETN planned one debate between the candidates for the senatorial race in Arkansas and one between the candidates for each of the four congressional races. Each debate was to last one hour, which meant that, after introductory and closing material, only about 53 minutes remained for discussion by, and questioning of, the candidates. Tr. Trans. 200 (S. Howarth). Consistent with AETN's purpose, the debates were to give AETN's viewers the opportunity to see a detailed discussion of the issues of greatest interest to them, so that as voters they could be well-informed on election day.

2. The Certification and Campaign of Ralph Forbes for Arkansas' Third Congressional District for the United States House of Representatives

For a candidate's name to appear on the ballot, he must become certified. Ark. Code Ann. § 7-7-101. Ralph Forbes sought certification as an independent candidate for the United States House of Representatives from Arkansas' Third Congressional District in the 1992 elections. See A.App. 57. To become certified as an independent, the candidate must file petitions signed by at least three percent of the qualified electors in the district in which he is seeking office (but no more than 2,000 signatures are required). Ark. Code Ann. § 7-7-103(c)(1); see A.App. 57-58. Forbes had approximately 50 volunteers who worked "very part-time" helping him gather the required signatures. A.App. 68. Forbes testified, however, that most of his volunteers "weren't that productive." Id. Consequently, Forbes "realized it's more productive . . . to just get [the signatures] [himself] rather than try to . . . organize people to help [him]." Id. So, Forbes went out seeking signatures many times from dawn until dusk. A.App. 57. He found that it was not easy to get signatures. Id. Forbes testified that "it's difficult for [him] to walk up to a stranger and introduce [himself]." A.App. 58. After two unsuccessful attempts, Forbes finally became certified in August, 1992. A.App. 57, 68. Forbes ran against the Democratic candidate,

John VanWinkle; the Republican candidate, Tim Hutchinson; and write-in candidate, Rex Petty. Tr. Trans. 302-03 (A. Oliver); A.App. 57, 85-86.

Forbes previously ran for the school board in Pulaski County, Arkansas in 1985, but he "didn't have hardly any votes." Tr. Trans. 144 (R. Forbes); A.App. 53. In 1986, he ran in the Republican primary election for Lt. Governor of Arkansas, but he did not win that election. Tr. Trans. 144 (R. Forbes); A.App. 54. In 1986, he also ran for a seat in the United States Senate. Records in the Office of the Secretary of State show that, in the Senate election, Forbes received 52 votes, out of 695,487 votes cast, or 0.01 percent. AETN Tr. Exh. 17 (Certified Copy of Arkansas Election Results 1986) at 2; Tr. Trans. 300 (A. Oliver). He ran again in the Republican primary run-off election for Lt. Governor in 1990, and lost that election as well. Tr. Trans. 146 (R. Forbes); A.App. 55. In that election, he received only 4,431 votes out of the 31,980 votes that were cast, or 13.86 percent. AETN Tr. Exh. 18 (Arkansas Election Results 1990) at 41; Tr. Trans. 300-01 (A. Oliver). In fact, Arkansas Election Results 1990 shows that, in the 1990 Republican primary run-off election, Forbes did not even win one of the 75 counties. AETN Tr. Exh. 18 at 42; Tr. Trans. 301 (A. Oliver); A.App. 56.

Forbes himself described his 1992 campaign organization as "[b]edlam." Tr. Trans. 146-67 (R. Forbes); A.App. 67. His wife and some of his children helped with his campaign. Tr. Trans. 147 (R. Forbes); A.App. 69. Otherwise, "[a] lot of people that had volunteered just weren't there in reality. And it was like some of my other campaigns, it boiled down to a one or two man campaign towards the end." A.App. 69-70; Tr. Trans. 147 (R. Forbes). Forbes had no paid campaign staff. A.App. 75. Other than his family, he had no volunteer staff who worked full-time or near full-time. Id. Forbes said there were "some or a few" part-time workers in his campaign, but not a "substantial" number. Id.

Forbes' house was his campaign headquarters. Tr. Trans. 147 (R. Forbes); A.App. 70. He did not rent any other headquarters. A.App. 70. "[W]herever [he] was was the headquarters." Id.; see Tr. Trans. 147 (R. Forbes).

Forbes did not have a campaign bus; he traveled around the Third Congressional District by private car. A.App. 77-78. When he was in other towns, he did not stay at hotels or motels, but instead "use[d] somebody else's home or bedroom or whatever." A.App. 70.

Forbes raised less than $10,000 for his 1992 campaign, which he admitted "wasn't very much by politician standards." Tr. Trans. 148 (R. Forbes); A.App. 70; AETN Tr. Exh. 21 (Certified copy of Report of Receipts and Disbursements for Ralph Forbes). (Forbes' opponents in the 1992 election, Tim Hutchinson and John VanWinkle, raised approximately $371,000 and $430,000, respectively. AETN Tr. Exhs. 19, 20 (Certified copies of Reports of Receipts and Disbursements for Tim Hutchinson, John VanWinkle); Tr. Trans. 301-02 (A. Oliver)). Although Forbes tried to raise more money, he was not successful because "[m]any people weren't aware that [he] was running." A.App. 75.

Forbes was not well known because he did not buy enough advertisements. Tr. Trans. 148 (R. Forbes); A.App. 71-72. He did not get nearly the coverage he needed in order to attract enough votes to win. Tr. Trans. 148-49 (R. Forbes); A.App. 74.

> First of all, there wouldn't be enough people seeing the ads. And secondly, even the ones that saw them would say they saw it once and it wouldn't necessarily be enough, you know, statistically, it wouldn't be enough for that person to click and say yeah, this guy has got a chance, I will vote for him.

A.App. 74. By way of analogy, Forbes stated that he "wasn't even a flea scratching an elephant." Id.; Tr. Trans. 150 (R. Forbes).

In addition, Forbes does not remember ever speaking to any large groups during his campaign. Tr. Trans. 155 (R. Forbes); A.App. 80. He never held rallies. Tr. Trans. 155 (R. Forbes); A.App. 79. At his deposition, Forbes testified that he received only one invitation to speak at a meeting, which he declined. A.App. 76-

77. At trial, Forbes testified that he received two invitations, both of which he declined. Tr. Trans. 172-73 (R. Forbes). He recalled:

> We kept trying to find out where -- for whatever reason, I don't know the reason, but the people that were inviting my two opponents [to speak] were not inviting me. I have no way of knowing why. It's just a fact, and we kept trying to find out where they were going but we always -- it was too late to -- to meet them or become part of that.

Tr. Trans. 173 (R. Forbes); see A.App. 77.

Forbes described the press coverage his campaign received as "zilch." Tr. Trans. 154 (R. Forbes); A.App. 81. When asked whether any reporters traveled with him, Forbes responded, "Absolutely not." Tr. Trans. 153 (R. Forbes); A.App. 78.

> I was told by many people that there was a general consensus that we were nonpersons, we didn't exist, our campaign didn't exist and it was just generally agreed by everyone that no matter what I did, if I ran around in a flaming war bonnet naked jumping off towers, it would be not newsworthy. And the odd part about one thing I do recall, I think it's Osahi or however they pronounce it, it's the largest Japanese news media in the country, kept calling me, they wanted to come down and film my campaign. I had to keep telling them I am sorry, there is nothing to film.

A.App. 77; Tr. Trans. 153 (R. Forbes). Forbes testified that his opponents -- the Democratic and Republican candidates, Mr. VanWinkle and Mr. Hutchinson -- were "getting statewide coverage . . . they were getting as much coverage, perhaps, as the [sic] Governor Clinton, who was running for president." A.App. 80-81.

Forbes knew he needed a miracle in order to win the 1992 election. Tr. Trans. 162 (R. Forbes); A.App. 92. Forbes received approximately two and a half percent of the vote in the 1992 election. AETN Tr. Exh. 22 (Arkansas Election Results 1992) at 49; Tr. Trans. 303 (A. Oliver).

3. Forbes' Request to be Included in the Debate and AETN's Consideration and Disposition of the Request

On June 17, 1992, Bill Simmons of the Associated Press sent invitations to each major party candidate in the Senate and House races, inviting them to participate in AETN's televised debates. For the Third Congressional District, invitations were sent to Mr. VanWinkle, the Democratic candidate, and Mr. Hutchinson, the Republican candidate. At the time, no other qualified candidates were running for this seat. See A.App. 59-60. Exactly two months later, on August 17, 1992, Ralph Forbes qualified as a candidate. A.App. 57. By letter of August 24, 1992, Forbes asked to be included in the debate with Mr. VanWinkle and Mr. Hutchinson. AETN Tr. Exh. 11.

AETN, Mr. Simmons of the AP, considered whether to invite Forbes to the debate. The feeling of the professional staff at AETN and Mr. Simmons was that, with only 53 minutes for the actual debate, time was a precious commodity; if there were too many participants, there would not be enough time for each candidate to address issues in an in-depth, meaningful manner. They felt that the debates would not be worthwhile if the candidates had time only to make short, superficial statements about issues. They concluded that, to provide an informative debate and serve viewers best, the issues should be discussed in-depth by those candidates who had a realistic chance of winning. Tr. Trans. 198-201, 207-08 (S. Howarth); Tr. Trans. 293 (A. Oliver).

Ms. Oliver made a recommendation, through Ms. Adornetto, to Ms. Howarth about whom to invite to the debate. She conducted careful, thorough research about Forbes' campaign to determine as a practical matter, whether he had a chance to win the election. Tr. Trans. 297 (A. Oliver). Ms. Oliver used her professional journalistic

judgment in making this evaluation. She consulted Mr. Simmons and other journalists to assess how politicians and knowledgeable political observers viewed Forbes. Tr. Trans. 294-95, 296, 297-98, 298-99 (A. Oliver); Tr. Trans. 200, 202, 212-14 (S. Howarth). Mr. Simmons' professional judgment was that, in the 1992 election, Forbes had no popular support and that he should not be invited to the debate. AETN Tr. Exh. 16 (Memo. dated June 19, 1992 from A. Oliver to C. Adornetto).

Ms. Oliver also reviewed results of the 1990 Republican primary run-off election for Lt. Governor, in which Forbes did not win a single county. See Tr. Trans. 300-01; AETN Tr. Exh. 18 (Arkansas Election Results 1990) at 42; AETN Tr. Exh. 13 (Memo. dated Sept. 14, 1992 from A. Oliver to C. Adornetto). Moreover, she learned that Forbes raised a very small amount of money for his campaign, did not have any paid or volunteer campaign staff, and did not have campaign headquarters, other than his house. Tr. Trans. 199, 202, 212-14 (S. Howarth); AETN Tr. Exhs. 13, 14, 16. Ms. Oliver concluded that Forbes had little popular support among voters of the Third District, and that other responsible political journalists did not consider him a significant participant in the race. Tr. Trans. 296 (A. Oliver); AETN Tr. Exhs. 13, 14. Ms. Oliver judged that Forbes had no practical chance of winning the election, that is, that Forbes was not a serious candidate. AETN Tr. Exhs. 13, 14, 16. Accordingly, Ms. Oliver recommended not inviting Forbes to participate in the debate.

Ms. Adornetto and Ms. Howarth, using their professional journalistic judgment, agreed. See Tr. Trans. 298 (A. Oliver). Accepting Ms. Oliver's recommendation, Ms. Howarth decided not to invite Forbes to the debate. Id. Ms. Howarth notified Forbes of this decision in a letter dated September 4, 1992. AETN Tr. Exh. 12.

Ms. Howarth's decision not to invite Forbes to the debate was not based on Ms. Howarth's, Ms. Adornetto's, Mr. Oliver's, or Mr. Simmons' hostility toward Forbes' views or on favoritism towards the views of other candidates. In fact, the decision was not in any way based on Forbes' views. Tr. Trans. 210 (S. Howarth); Tr. Trans. 295-96, 345 (A. Oliver). And it was not the result of political or other

pressure. Tr. Trans. 209-10 (S. Howarth); Tr. Trans. 304 (A. Oliver). Rather, it was a professional decision of the kind that journalists, like those at AETN and the AP, routinely make.

4. Forbes' Knowledge of AETN's Decision-Making Process Concerning Whether to Invite Him to the Debate

Forbes knew nothing about the analytical process that led Ms. Howarth not to invite him to the debate. At trial, he proffered no evidence about AETN's decision process, and testified that he has no direct knowledge of how decisions were made concerning whom to invite to the debate. Tr. Trans. 165 (R. Forbes); A.App. 66, 88.

In addition, Forbes has no knowledge of any political pressure being applied to anyone at AETN concerning the debate. Tr. Trans. 165-66 (R. Forbes); A.App. 84; A.App. 64-65, 82-83, 86-87, 93,94. Forbes has no knowledge of any irregularities in AETN's decision-making process concerning the debate. A.App. 88. While he is unhappy with AETN's decision, he knows of nothing that happened, for example, the application of political pressure, that would cause him to describe the decision-making process as tainted in any way. Tr. Trans. 166-67 (R. Forbes); A.App. 89.

SUMMARY OF ARGUMENT

Public broadcasters, including state entities such as AETN, are licensed under the Communications Act, which requires all licensees to have the capacity to exercise unfettered editorial discretion. Under decisions of the U.S. Supreme Court and other Courts of Appeals, a state-entity public broadcaster's editorial decisions are protected from judicial second-guessing under the First Amendment. Only in the event of a state's political interference with the programming judgments of a licensee's professional staff (or a state policy or practice that pervasively curtails access to ideas, see, e.g., Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486, 489 (11th Cir. 1990), cert. denied, 112 S. Ct. 71 (1991)), would a state-entity licensee forfeit First Amendment protection for its programming decisions.

This Court's earlier en banc decision in this case required AETN to "provide a rational and viewpoint-neutral justification" for its decision not to invite Forbes to the debate. Forbes, 22 F.3d at 1430. If AETN must justify this editorial decision, then it can be haled into court to prove the basis for any editorial decision with which a disgruntled viewer disagrees. This is an intolerable burden on AETN's editorial prerogatives, and is inconsistent with the deference to public broadcasters' editorial discretion that is mandated by precedent.

The District Court properly instructed the jury and properly gave the jury a special verdict interrogatory on the question of whether political pressure affected AETN's editorial decision not to invite Forbes to the debate. Further, the District Court's evidentiary rulings are supported by case law. The decision below should be affirmed on the ground that AETN's content-based decision not to invite Forbes is protected by the First Amendment.

ARGUMENT

I. AETN'S DECISION TO HOLD A POLITICAL DEBATE WITHOUT INVITING A FRINGE CANDIDATE IS AN EXERCISE OF EDITORIAL DISCRETION PROTECTED BY THE FIRST AMENDMENT, AND THIS COURT SHOULD ADOPT A TEST TO PROTECT STATE-ENTITY PROGRAMMING JUDGMENTS THAT ARE NOT THE PRODUCT OF POLITICAL INTERFERENCE BY THE STATE.

A. The Statutory Framework

1. The History of Noncommercial, Educational Broadcasting

"The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." FCC v. League of Women Voters, 468 U.S. 364, 367 (1984). The Radio Act of 1927 and the Communications Act of 1934 made no special provisions for noncommercial, educational broadcasting stations. Id. Thus, they

are subject to the same licensing requirements as commercial broadcasting stations. Id. In 1939 and 1952, the FCC reserved certain radio frequencies and television allocations for educational use. Id. In 1962, for the first time, Congress provided for direct financial assistance to noncommercial, educational broadcasting. Id. In 1967, Congress enacted the Public Broadcasting Act of 1967, establishing the framework for public broadcasting as we know it today. Id. at 368. This legislation created the Corporation for Public Broadcasting ("CPB")to fund noncommercial, educational broadcasting. Id. Grants from CPB account for only a portion of total support. Id. at 390 n.19. "The vast majority of financial support comes instead from state and local governments, as well as a wide variety of private sources. . . ." Id. At least two-thirds of public television stations are licensed to states or state-related entities. Id. at 393 n.22.

2. The Communications Act Requires that AETC, as the Licensee of AETN, Exercise Unfettered Editorial Discretion Over Programming

In enacting the Communications Act, "the intention of Congress [was] to maintain a substantial measure of journalistic independence for the broadcast licensee." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 116 (1973). Thus, the FCC "fulfilled its statutory obligations by promulgating regulations which view licensees as having the sole right and nondelegable responsibility to select the programs to be broadcast." Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1040 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

> A basic premise of Communications policy is that a licensee is a `trustee' for the public, and that he must therefore assume the `primary duty and privilege to select the material to be broadcast to his audience. . . .' [citations omitted]. `The [Federal Communications] Commission has always regarded the maintenance of control over programming as a

> most fundamental obligation of the licensee.' [citations omitted].

Cosmopolitan Broadcasting Corp. v. FCC, 581 F.2d 917, 921 (D.C. Cir. 1978). Maintaining programming control is so important that the FCC denies license renewals when licensees fail to maintain control over programming. See, e.g., Cosmopolitan Broadcasting Corp., 59 F.C.C.2d 558 (1976), recons. denied, 61 F.C.C.2d 257 (1975), rev'd on other grounds, 581 F.2d 917 (1978).

In general, licensees of public television are subject to the same regulatory requirements as licensees of commercial television. Muir, 688 F.2d at 1040. In addition, the Public Broadcasting Act of 1967 "illustrates a Congressional desire that public broadcast licensees retain independent programming responsibility." Id. "Thus the FCC, in its demand for unfettered licensee control over programming has made no distinction between private and public licensees." Id. Accordingly, for the FCC to find "that the public interest, convenience, and necessity would be served by" AETC's remaining the licensee of its stations, see 47 U.S.C. § 309 (1988), AETC (through Ms. Howarth, its Executive Director) must be able to exercise unhindered programming discretion. This is because "certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard." Columbia Broadcasting Sys., 412 U.S. at 120.

"[N]oncommercial broadcasters, no less than their commercial counterparts, are entitled to invoke the protection of the First Amendment and to place upon the Government the burden of justifying any practice which restricts free decisionmaking." Community-Serv. Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (footnote omitted). In other words, "broadcasters are engaged in a vital and independent form of communicative activity," and state broadcast licensees are "`entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public [duties]."'" FCC v. League of Women Voters, 468 U.S. at 378 (citations omitted).

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broadcasting Sys., 412 U.S. at 124-25.

3. AETN Was Not Required To Provide Forbes "Equal Opportunities" Under the Communications Act

Section 315(a) of the Communications Act, 47 U.S.C. § 315 (1988), requires broadcasters to afford "equal opportunities" to legally qualified opponents of candidates who "use" their facilities.[3/]

3/ 47 U.S.C. § 315 (1988) provides:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any –
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news

(continued...)

Political Primer 1984, 100 F.C.C.2d 1476, 1489-93 (1984); see also Codification of the Federal Communications Commission's Political Programming Policies, 7 FCC Rcd 678 (1991), modified, 7 FCC Rcd 4611 (1992). However, if a candidate's appearance falls within any of Section 315's four exemptions, including "on-the-spot coverage of a bona fide news event," opponents are not entitled to equal opportunities. Political Primer 1984, 100 F.C.C.2d at 1493, 1500-02.

In Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976), the Court of Appeals upheld an FCC ruling (reversing an earlier FCC opinion) that broadcast of candidates' debates was exempt from "equal opportunities" as "on-the-spot coverage." Id. at 358, 359. To qualify for the exemption, the debate had to be organized by someone other than a broadcaster and held in a location other than a broadcast studio. Id. at 354. The appearance was exempt if the decision to cover it was based on the broadcaster's good faith, reasonable news judgment, and not because the broadcaster sought to advance a particular candidacy. Id. at 359.

Seven years later, in Henry Geller, 95 F.C.C.2d 1236 (1983), aff'd, mem., League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1984), the FCC expanded the scope of the "on-the-

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3/ (...continued)

documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

spot" coverage exemption to include debates organized by broadcasters and held in broadcast studios. The FCC declared that, "it is clear that Congress intended to give broadcasters great discretion in their news programming decisions," 95 F.C.C.2d at 1242, and cited Chisholm for the proposition that, "`in order to facilitate broadcast coverage of political news, Congress knowingly faced risks of political favoritism by broadcasters, and opted in favor of broader coverage and increased broadcaster discretion.'" Id. (quoting Chisholm, 538 F.2d at 366).

A candidate not invited to a debate may complain to the FCC to challenge the debate's exempt status only by adducing evidence of bad faith -- that the licensee intended to advance a particular candidacy instead of basing its broadcast decision on a bona fide editorial judgment. The candidate satisfies this burden by providing "extrinsic evidence" that the licensee "acted in bad faith or that its motive . . . was to advance . . . [a particular] candidacy." Brown for President Comm., 75 F.C.C.2d 609, 613-14 (1980). If the candidate meets the burden, the broadcast is non-exempt, and the candidate is entitled to equal opportunities on the station or network. Andrew J. Watson, 26 F.C.C.2d 236 (1970); Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255, rev. denied, 14 F.C.C.2d 861 (1968); Conservative Party, 40 F.C.C. 1086 (1962).

The FCC consistently resolves candidates' complaints under Section 315(a)(4) by analyzing whether the broadcaster exercised good faith news judgment. This is true whether the broadcaster is commercial[4/] or noncommercial and, if the latter, whether a state-

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4/ Johnson v. FCC, 829 F.2d 157, 160-63 (D.C. Cir. 1987) (Citizens Party candidates' request to be included in broadcast political debate held "a demand for broadcast access," and inconsistent with Congress' decision to promote coverage of political news and First Amendment interest in preserving broadcasters' journalistic discretion); King Broadcasting Co. v. FCC, 860 F.2d 465 (D.C. Cir. 1988), on remand, 6 FCC Rcd 4998 (1991).

related[5/] or a community licensee.[6/] Protection of broadcast licensees' news judgment -- the good-faith exercise of editorial discretion -- is, therefore, maintained.

Furthermore, there is no private cause of action in federal court to enforce Section 315.[7/] Forbes, 22 F.3d at 1427. Instead, a plaintiff, like Forbes, must bring his claim before the FCC and then appeal it, if necessary, to the Court of Appeals. Id. Had Forbes brought his claim to the FCC, it would have been dismissed because AETN's broadcast of a political candidates' debate is considered "on-the-spot coverage of a bona fide news event." See Henry Geller, 95 F.C.C.2d at 1238. As such, AETN is exempt from having to provide equal opportunities to Forbes. Even if Forbes had challenged the

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5/ Jim Trinity, Letter, 7 FCC Rcd 3199 (1992) (state university licensee); Arthur R. Block, Letter, 7 FCC Rcd 1784 (1992) (community licensee and state university licensee).

6/ Cyril E. Sagan, 1 FCC Rcd 10 (1986) (community licensee).

7/ Section 315(d), 47 U.S.C. § 315(d), instructs the FCC to "prescribe appropriate rules and regulations to carry out the provisions" of Section 315. Courts repeatedly hold that the FCC is "the primary and exclusive forum in which to institute and prosecute alleged violations of section 315(a) by broadcast licensees." Ackerman v. Columbia Broadcasting Sys., Inc., 301 F. Supp. 628, 631 (S.D.N.Y. 1969); see also Lamb v. Griffin Television, Inc., 804 F. Supp. 1430, 1431 (W.D. Okla. 1992); Maher v. Sun Publications, Inc., 459 F. Supp. 353, 356 (D. Kan. 1978); Gordon v. National Broadcasting Co., 287 F. Supp. 452, 455 (S.D.N.Y. 1968) (equal time complaint "fatally defective in that it fails to allege that the plaintiff has availed himself of the primary and exclusive jurisdiction of the Federal Communications Commission"). No private cause of action exists to enforce Section 315. See, e.g., Belluso v. Turner Communications Corp., 633 F.2d 393, 397 (5th Cir. 1980)("creation of a private cause of action would be inconsistent with the clear legislative intent to centralize enforcement of the Act in the expert agency").

broadcast's exempt status, he would have been unsuccessful because he had no evidence of any discriminatory motive on the part of anyone at AETN. A.App. 88-89. Instead, the decision not to invite Forbes was a good-faith professional journalistic judgment. Tr. Trans. 206-207 (S. Howarth); Tr. Trans. 295-297 (A. Oliver).

4. Forbes Never Requested "Reasonable Access"

The Communications Act also specifies that every legally qualified federal candidate may request, and the broadcaster must grant, some program time under the "reasonable access" provision.[8/] 47 U.S.C. §312(a)(7)(1988). This was true of Forbes, whether or not he was entitled to "equal opportunities" as a result of the debate. See Political Primer 1984, 100 F.C.C.2d at 1479, 1523. On a noncommercial station or network such as AETC's, no charge can be made for the time granted under reasonable access. Even though Forbes was not entitled to participate in the debate, if he had made a reasonable access request to AETN, he would have been granted program time that he could have used as he saw fit, with no censorship by AETN. Id. at 1524.

However, Forbes requested only that he be allowed to participate in the debate. Contrary to the statement in this Court's

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8/ 47 U.S.C. § 312 (1988) provides, in part:

Administrative Sanctions

(a) The [Federal Communications] Commission may revoke any station license or construction permit --

. . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

earlier decision at footnote 4, Forbes, 22 F.3d at 1429-30 n.4, AETN never understood Forbes to request an opportunity to appear on AETN under reasonable access, separate and apart from the debate. Tr. Trans. 351-352 (O. Goss). In other words, Forbes never requested "reasonable access" within the meaning of Section 312(a)(7). Tr. Trans. 351-352 (O. Goss); Tr. Trans. 203-205 (S. Howarth); see also Tr. Trans. 157-164, 167 (R. Forbes) (Forbes has no written record of a request to AETN for time, other than the debate, to appear on AETN); (Forbes testified that the night of the debate he asked Mr. Goss for time to appear on AETN beside the debate. But, he also testified that it is "possible" that Mr. Goss may have thought that he was talking about being allowed to participate in the debate or about winning the lawsuit instead of being allowed time outside the debate. Forbes stated, "So we may not have been on the same wavelength, that is correct." A.App. 85.) AETN would have granted Forbes some broadcast time under Section 312(a)(7) if he had made a reasonable access request. Tr. Trans. 203-205 (S. Howarth).

B. The Constitutional Framework

This Court's earlier opinion holds that, "AETN must provide a rational and viewpoint-neutral justification for its determination [not to invite Forbes to the debate]." Forbes, 22 F.3d at 1430. Yet this Court emphasized that its approach was based on a sparse record, for AETN had not even answered Forbes' complaint. Id. Consequently, certain assumptions made by this Court should be revisited in light of the record developed since the en banc decision.

The foremost of those assumptions appears in this Court's analysis of the debate as a non-public forum:

> Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third Congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoints, it has violated his First Amendment rights.

Id. at 1429. On this assumption, this Court stated that, because AETN had not yet articulated its reasons for not inviting Forbes to the debate, the District Court erred in dismissing Forbes' First Amendment claim under Rule 12(b)(6). Id. at 1430.

The record on summary judgment reveals that this key assumption -- that Forbes was a member of the class of speakers for whose benefit the debate was held -- is wrong. Rather, the testimony of Ms. Howarth and Ms. Oliver demonstrates that the debate was held to benefit AETN's viewers, many of whom would be voting in the election. Tr. Trans. 198-201, 207-208 (S. Howarth); Tr. Trans. 293, 298-299 (A. Oliver). This is consistent with AETN's purpose as reflected in the statute and the Programming Policy Statement. See Ark. Code Ann. § 6-3-105; A.App. 46 (Programming Policy Statement for AETN, Sections 10, 14). Further, Forbes testified that he knew nothing about the purpose or process of setting up the debate, so that he is unable to controvert the statements of Ms. Howarth and Ms. Oliver about the debate's purpose. See Tr. Trans. 165-167 (R. Forbes); A.App. 65-66, 84, 88.

The earlier record before this Court of Appeals also did not include AETC's Programming Policy Statement, emphasizing a program service tailored to the interests of AETN's viewers, nor the Statement of Principles of Editorial Integrity in Public Broadcasting. A.App. 32, 44.

How is this Court's analysis affected by the fact that the viewers, and not the candidates, constituted the class of the debate's intended beneficiaries? Does this alter the requirement for AETN to "provide a rational and viewpoint-neutral justification" for not inviting Forbes to the debate? And how does this fact alter this Court's reliance on Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 811 (1985), dealing with concerns over "'viewpoint-based discrimination,'" Forbes, 22 F.2d at 1430, quoting Cornelius, 473 U.S. at 811?

At the outset, there is no evidence that the debate was conceived or produced by AETN for the purpose of advancing a particular candidacy. See Brown for President Comm., 75 F.C.C.2d at 613-14. Because Forbes testified that he knew nothing about AETN's process in planning and producing the debate, and knew of no irregularities in AETN's decision-making process concerning the debate, A.App. 88, he could not have met the burden under FCC decisions of providing extrinsic evidence of broadcaster bad faith. That failure of proof would have barred a decision by the FCC that the debate was non-exempt under Section 315(a) of the Communications Act. So, had Forbes proceeded before the FCC, he would not have been entitled to equal opportunities on AETN. See Andrew J. Watson, 26 F.C.C.2d 236; Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255; Conservative Party, 40 F.C.C. 1086. (Of course, as a legally qualified federal candidate, Forbes would still have been entitled to some programming time had he asked AETN for "reasonable access" under 47 U.S.C. § 312(a)(7).)

Concomitantly, there is no evidence whatever that the decision maker, Ms. Howarth, or anyone who made recommendations to her about whether to invite Forbes, was subjected to any pressure from any political or administrative official of the State of Arkansas to include (or not include) Forbes in the debate. It is a record fact that the programming and editorial integrity policies adopted by AETC were followed in this case.

On these facts, this Court's test in Forbes is no longer appropriate. That is true despite the fact that AETN (and its advisor, Mr. Simmons) did not consider the views of Forbes or his opponents in deciding whom to invite to the debate. The reason is that AETN's invitations were still based on the viewpoints of professional journalists about the criteria to be used in selecting debate participants. The decision of AETN to produce election debates was the result of a viewpoint that debates would be beneficial to the citizens of Arkansas. Decisions about the format of the debates was the result of a viewpoint that that format would work best. Decisions to consider the candidates' standing in the polls, level of political activity, level of campaign contributions and expenditures, press coverage (or lack of it), and major-party support are all viewpoints,

or based on viewpoints, of professional journalists. The decision to invite only those candidates who had a practical chance of winning the election was the result of a viewpoint that limiting the participants that way would lead to more worthwhile debates for AETN's viewers. As a practical, and foreseeable, matter, the decision screened out the viewpoints of all but the major party candidates. And, of course, the decision about whether Forbes had a practical chance of winning was the result of a viewpoint that he did not have popular support among the voters of the Third District. While these criteria can to some extent be considered as objective, ultimately their use is essentially subjective. Indeed, these are precisely the kind of subjective editorial judgments that are protected under Columbia Broadcasting Sys. v. Democratic Nat'l Comm..

It is unclear from this Court's opinion whether these facts meet the test of "a rational and viewpoint-neutral justification," or whether this Court now will reformulate the test to tailor it to this record (particularly because Forbes cannot be considered in the class of intended beneficiaries of the debate). In considering these questions, this Court should look to decisions of the Supreme Court and of other Courts of Appeals that have analyzed whether state-owned public broadcasters can exercise editorial discretion to the same extent as non-state-owned broadcasters.

In FCC v. League of Women Voters, 468 U.S. 364 (1984), the Court held unconstitutional a statute that made editorializing illegal for noncommercial broadcasters that received funds from the Corporation for Public Broadcasting. The Court relied on Columbia Broadcasting Sys. v. Democratic Nat'l Comm. for the proposition that less drastic means were available to advance the public's interest against "lopsided presentations of narrow partisan positions" by public stations that received public funds. 468 U.S. at 397-98. The Court held that the editorializing ban was "not crafted with sufficient precision to remedy [the] dangers" of abuse from editorializing by public stations that received federal funds. Id. at 398. (The Court reached this conclusion even in light of the argument that stations owned by state governments were especially likely to broadcast views favorable to state authorities. Id. at 393.)

Moreover, in non-broadcast, non-public forum settings, the Court has been especially careful to tailor its formulation of access rights based on the particular characteristics of the non-public forum involved. For example, in Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37 (1983), where the Court denied a union access to a school district's mailbox system (a non-public forum), the Court explained:

> When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction.

Id. at 55. The task here is to determine on this record what criteria AETC, a state-owned public broadcasting licensee, may use to make distinctions about the speech on AETN.

This general question has attended public broadcasting for more than two decades. See generally, Canby, "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 Texas L. Rev. 1123 (1974) (quoted in FCC v. League of Women Voters, 468 U.S. at 392 n.21.). In each case, it requires resolving the tension between the state-owned public broadcaster's First Amendment and Communications Act rights to exercise editorial discretion, on the one hand, and the First Amendment rights of individuals to be free from content-based discrimination by the government, on the other. See generally, Chandler v. Georgia Pub. Telecommunications Comm'n, 917 F.2d 486 (11th Cir. 1990), cert. denied, 112 S. Ct. 71 (1991); Schneider v. Indian River Community College Found., Inc., 875 F.2d 1537 (11th Cir. 1989); Muir, 688 F.2d 1033; Community-Serv. Broadcasting, 593 F.2d 1102.

All of these cases deal with challenges to the right of state-entity public broadcast licensees to make the same kind of unfettered editorial decisions that are, under Columbia Broadcasting Sys. v. Democratic Nat'l Comm., the acknowledged right of commercial broadcasters and of public, non-state entity broadcast licensees. The cases are consistent in upholding the editorial prerogatives of state-owned licensees, and are helpful in analyzing the record here.

Of these cases, only Chandler closely parallels the facts of this case, holding that the executive director of Georgia's state-owned public television network could make a "content-based" decision to air a debate only between the major party candidates for lieutenant governor, and exclude the Libertarian candidate. 917 F.2d at 488-89 (majority), 491, 493 (dissent). The dissent in Chandler, which argued that the Georgia network had "already decided to give over its airwaves to political contenders for the offices [in question]," Id. at 493, is worth noting for its contrast to the facts of the instant case (as well as to the facts found by the Chandler majority). The record demonstrates that AETN decided to broadcast debates that offered viewers the opportunity for an in-depth look at the opinions of those candidates for federal office who had a reasonable likelihood of winning election. That required AETN to make editorial decisions about which candidates to invite. AETN did not at any time decide to hold debates among all legally qualified candidates for the federal offices in contest in 1992.

Chandler relied on Schneider and Muir for the analytical approach necessary to tailor the forum analysis in Cornelius to the facts of the Georgia television debate. 917 F.2d at 488-89 & n.3. The Schneider court, noting that Judge Rubin's opinion in Muir was controlling, 875 F.2d at 1541, held:

> It is clear that Congress concluded that the First Amendment rights of public television viewers . . . .are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest.

875 F.2d at 1541 (footnote omitted).

In Muir, which upheld state-owned public television licensees' rights to decline to broadcast the program, "Death of a Princess," Judge Rubin began by noting that First Amendment limitations imposed under traditional forum analysis, or under time, place, and manner doctrine, cannot simply be transferred to a medium of communication such as television:

> The limitations imposed by the first amendment on the operation of a medium of communication cannot be determined by application of the rules governing freedom of expression in streets and other areas that by tradition or design serve as platforms for expression subject only to reasonable time, place, and manner restrictions and free from content control.

688 F.2d at 1048. Citing Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), he explained:

> Determination of the constitutional limitations that result because a television licensee is a state agency rather than a private agency must take into account not only the rights of viewers but a number of other considerations. The license is federally bestowed. The state agency licensee has both a statutory duty to comply with the rules and regulations governing the use of its license and, like other licensees, the statutory right to determine the ways in which it shall fulfill that duty.
>
> . . . .
>
> Even the fact that the state is engaged in television broadcasting does not fully define the constitutional limitations on its actions, for such broadcasting might be designed to serve

> differing purposes. Licensing is not destiny. That the state is the licensee does not predetermine the station's function. The state may elect the station's mission, so long as this mission is consistent with the station's license and the Constitution. The prerogatives of managers, editors, and programmers, the rights of access of those who seek exposure, and the rights of viewers, as well as the prerogatives of the licensee itself as a state agency, are at least in large part determined by this mission.

Id. at 1049 (emphasis supplied).

Here, the Arkansas legislature selected AETC's mission as making the benefits of educational television available to inhabitants of Arkansas. Ark. Code Ann. §§ 6-3-101, 6-3-105(a). Under this statute, AETC adopted programming and editorial polices designed to benefit the people of Arkansas by ensuring the editorial independence of the professional programmers at AETN, and delegated final authority for editorial decisions to AETC's Executive Director, Ms. Howarth. In sum, the state has selected the mission of AETC as that of a journalistic enterprise, the editorial processes of which are protected by organizational structure and policy from interference by the political and administrative agents of the state. AETC's officially adopted policies show the intention to take on the full measure of licensee responsibility required by the FCC under the public interest standard of Section 309 of the Communications Act – the obligation to exercise unfettered programming discretion.

In this way AETN, like the Georgia network in Chandler, consistently with the First Amendment, is enabled to make content-based editorial judgments. Because of its structure and policies, AETN's programming decisions, like those of the Georgia network, fall under the category of good faith, bona fide editorial judgment, rather than under the category of censorship or discrimination:

> It is clear that [the Georgia Public Television Commission] `regulated content' by making a

> decision to air debates between candidates of the major parties. . . . [H]owever, this content-based decision is not viewpoint restrictive and does not violate the First Amendment. As noted above, GPTC makes content-based decisions on a regular basis to serve Georgians. A decision to air any show is necessarily content-based. GPTC chose to air a debate between only the Democratic and Republican candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. Such a decision promoted GPTC's function, was `reasonable' and was `not an effort to suppress expression merely because public officials oppose the speaker's views.'

917 F.2d at 489, citing Cornelius, 473 U.S. at 800.

If AETN's programming decisions about the debate had been influenced by political pressure from the state, the result would be different. Under those circumstances, AETN could no longer claim the protection of the First Amendment, because AETN would no longer be functioning as an editorial entity that is kept independent of the state's political influence. Instead, it would be functioning as part of the state's political apparatus. See Muir, 688 F.2d at 1050 (opinion of Rubin, J.); Chandler, 917 F.2d at 488; see also Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510, 2516-17 (1995) (discussing "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created"); Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141, 2147 (1993) (analyzing Cornelius' approval of governmental control over access to a non-public forum if the restrictions are reasonable in light of the forum's purpose and viewpoint-neutral). Here, the statute enacted by the Arkansas legislature and the policies on editorial integrity adopted by AETC satisfy both tests. They are reasonable because they empower the professional journalists at AETN to exercise the programming discretion necessary to satisfy Communications Act requirements,

and they are viewpoint-neutral because they do not direct the professional staff to make programming judgments according to any state-imposed viewpoint.

If AETN operated as part of Arkansas' political apparatus, then all of AETN's editorial judgments would be subject to scrutiny for censorship or discrimination, that is, for potential violation of the First Amendment rights of anyone who complained. Every journalistic decision would be open to challenge in court. See Chandler, 917 F.2d at 489-90. As a practical matter and as a matter of law, AETN would no longer be able to exercise the unfettered editorial discretion that is a necessary attribute of any broadcast licensee under the FCC's well-established regulatory policies. In other words, if AETN's editorial functioning were not insulated from the state, AETN would perforce, inescapably, be disqualified from remaining a broadcast licensee under the Communications Act.

This analytical path demonstrates that potential First Amendment abuse by state-owned public broadcast licensees is not beyond remedy by the courts. See Id. at 489 (finding no pervasive policy or practice "'lending a constitutionally impermissible, discriminatory bias to the station's mission,'" citing Schneider, 875 F.2d at 1541). However, the predicate condition of political (or administrative) involvement by the state in the broadcast licensee's editorial processes must first be alleged and demonstrated. Forbes makes no such predicate showing, and testified in trial and in his deposition that he knows of no facts or witnesses who could support such a showing.

The FCC's doctrine, enunciated in such cases as Brown for President Comm., 75 F.C.C.2d at 613-14; Andrew J. Watson, 26 F.C.C.2d 236; Constitutional Party and Frank W. Gaydosh, 14 F.C.C.2d 255; and Conservative Party, 40 F.C.C. 1086, requires a complainant to make an initial proffer of "extrinsic evidence" that a licensee acted in bad faith, with a motive to advance a particular candidacy, in order to show that a political debate is not exempt from equal opportunities.

This Court should discard its test requiring AETN to "provide a rational and viewpoint-neutral justification" for its decision not to invite Forbes, and adopt instead a test based on a threshold showing of political interference by the state in the broadcasting entity's editorial processes. That is a less restrictive means for reviewing a state-owned broadcast licensee's exercise of its First Amendment and Communications Act rights to make unhindered editorial decisions. See FCC v. League of Women Voters, 468 U.S. at 395; Muir, 688 F.2d at 1052-53 (concurrence) (discussing the disruptive effects on licensee discretion of court reassessment of editorial decisions); Community-Serv. Broadcasting, 593 F.2d at 1118 & n.38. This approach offers the best method for reconciling the potentially conflicting First Amendment rights at issue when a complaint is made about the programming decisions of state-owned public broadcasting licensees.

C. Protection of AETN's Exercise of Editorial Discretion in this Case

The decision not to invite Forbes to the debate was the result of a professional journalistic judgment that it was in the best interest of AETN's viewers to limit participation to candidates who had a realistic chance of winning the election, and that Forbes was not such a candidate. Tr. Trans. 206-208 (S. Howarth); Tr. Trans. 293, 298-299 (A. Oliver). The decision was based on estimating Forbes' support among the voters of the Third Congressional District. Tr. Trans. 198-201 (S. Howarth); Tr. Trans. 295, 303-304 (A. Oliver). It was not based in any way on Forbes' views. It was not based on hostility toward his views or on favoritism for the views of his opponents. Tr. Trans. 210-211 (S. Howarth); Tr. Trans. 295-296 (A. Oliver). Moreover, it was not the result of political or administrative pressure from the state. Tr. Trans. 209-210 (S. Howarth); Tr. Trans. 304-305 (A. Oliver). Forbes has no evidence to the contrary. He has no knowledge of any irregularity in the decision-making process, any bad faith or bias, or any political interference. A.App. 64-65, 82-83, 84, 86-87, 88, 89, 93, 94.

Thus, the uncontroverted evidence proves that AETN's decision not to invite Forbes was a decision not influenced by political

pressures. Rather, it was the result of a decision of AETN's professional staff, based on their good-faith editorial judgment.

II. PRECEDENT SUPPORTS THE DISTRICT COURT'S USE OF A SPECIAL VERDICT FORM, THE JURY INSTRUCTIONS USED, EXCLUSION OF CERTAIN EVIDENCE, AND REFUSAL TO INSTRUCT ON PUNITIVE DAMAGES, ALL AS CHALLENGED BY FORBES.

A. The Special Verdict Form

At the end of trial, the District Court submitted to the jury a special verdict form consisting of three interrogatories. Tr. Trans. 475. The first asked, "Do you find from a preponderance of the evidence that the defendants' decision to exclude Mr. Forbes from the debate was influenced in any way by political pressures from anyone inside or outside of the Arkansas Educational Television Network?" Id. The jury answered "no." Id. at 502. The second interrogatory asked the jury, "Do you find from a preponderance of the evidence that the defendants excluded Mr. Forbes from the political debate because of objections or opposition to his views?" Id. at 475. The jury also responded "no" to this question. Id. at 502. The final interrogatory concerned damages. Because the jury was instructed only to answer this question if they answered interrogatory two in the affirmative, the jury did not respond to the third interrogatory.

Forbes claims that the District Court erred in submitting interrogatory number one to the jury. He argues that this interrogatory was unnecessary to a finding that AETN violated his First Amendment rights, and that the effect of the question was to confuse the jury and prevent them from rendering a verdict in his favor. Appellant's Brief at 1. Forbes asserts the jury likely believed that they had to answer yes to interrogatory one and find that there was political pressure placed on AETN in order to answer yes to interrogatory two and find that AETN excluded Forbes from the debate because of his views. Id. at 1-2. Thus, Forbes argues that interrogatory one tainted the jury's verdict. However, neither the record nor the precedent Forbes cites support this conclusion.

Forbes points to David v. Merrill Lynch, Pierce, Fenner & Smith for the proposition that, "where possible, it is preferable that juries be given special verdict forms to facilitate effective appellate review." 906 F.2d 1206, 1220 (8th Cir. 1990)(finding that use of a general rather than a special verdict was not an abuse of discretion or reversible error). Forbes also relies on McDonnell v. Timmerman, which states that a trial court has discretion both as to "whether or not to utilize a special verdict," and as to "the form of the submitted interrogatories." 269 F.2d 54, 58 (8th Cir. 1959). Forbes also states that this circuit holds that a trial court's discretion in framing the special verdict's interrogatories "does not warrant withdrawing from the jury valid theories of recovery upon which a plaintiff has produced sufficient evidence." Commerford v. Olson, 794 F.2d 1319, 1323 (8th Cir. 1986).

Contrary to Forbes' argument, these cases support the District Court's decision to submit interrogatories one and two to the jury. The use of special verdict forms is preferred because it facilitates appellate review. David, 906 F.2d at 1220. The ease of appellate review was the District Court's stated purpose in submitting both interrogatories to the jury in this case. Tr. Trans. 429. The District Court sought to assure that the record contained the jury's findings both as to the question of political pressure on AETN and the possibility that AETN's decision-makers excluded Forbes because of his views. Id. By having both interrogatories answered, the District Court bolstered the specificity of factual findings available for this appeal. Id. at 430.

The District Court avoided the type of error that caused reversal in the case of Commerford v. Olson. There the plaintiff submitted evidence supporting two vicarious liability theories, one based on employment principles and the other on principles of apparent agency. Commerford, 794 F.2d at 1321. The court found error in having the special verdict interrogatories only address one of the two theories, rather than both. Id. at 1323. The District Court below avoided this possible error by submitting interrogatories on both AETN's theories.

Other cases Forbes lists are not analogous to the instant case. For example, in Silor v. Romero, 868 F.2d 1419 (5th Cir. 1989), the Court of Appeals, reviewing one of the special verdict questions, found that the trial court had misstated the applicable law on damages. Because the Court of Appeals found it "impossible to determine the extent to which the jury impermissibly compensated [Silor]," it reversed and remanded the matter for a new trial on damages. 868 F.2d at 1422. However, the District Court in Forbes did not misstate the law.

Forbes relies on Prudential Ins. Co. v. Morrow, 339 F.2d 411 (5th Cir. 1964). Appellant's Brief at 2-3. In Prudential, the issue was the enforcement of an insurance policy. 339 F.2d at 412. There were three primary factual issues to be submitted to the jury. Id. Instead of submitting three separate interrogatories, the District Court combined two issues into one interrogatory, and submitted only two interrogatories to the jury. Id. The Court of Appeals found that the combination was "duplicitous and confusing." Id. Prudential does not apply to the Forbes case, because the District Court submitted separate interrogatories on the two issues that the jury needed to consider, so that there would be an unequivocal finding on each.

Forbes points to Martin v. Gulf States Utils. Co., 344 F.2d 34 (5th Cir. 1965), where interrogatories submitted to the jury were so inconsistent and confusing that the jury was incapable of rendering "a verdict in accordance with the convictions which they held." 344 F.2d at 37. The Court of Appeals found that the misleading and confusing nature of the interrogatories was indicated by inconsistent answers from the jury, and by the jury's asking for guidance and clarification numerous times during deliberations. Id. In contrast, the questions submitted to the Forbes jury did not lead to inconsistent responses, and the jury did not require clarification during deliberations.

In Scott v. Isbrandtsen Co., 327 F.2d 113, 119-123 (4th Cir. 1964), Appellant's Brief at 3, the first interrogatory was phrased so that it was open to several possible interpretations. The Court of Appeals found that the jury's response to this interrogatory prevented fair consideration of the plaintiff's case. Scott, 327 F.2d at 123.

Unlike Scott, the wording of interrogatories in Forbes was not open to several misleading interpretations. Instead, the Forbes interrogatories fall within the Scott court's instructions about proper special verdict questions: "[Q]uestions should be simple and clear, with one single issue in each question. Double questions, or questions in the alternative, should be avoided." Scott 327 F.2d at 122-123.

United States Fire Ins. Co. v. Pressed Steel Tank Co., Inc., 852 F.2d 313 (7th Cir. 1988), on which Forbes relies, Appellant's Brief at 3, actually supports the District Court in this case. In U.S. Fire Ins. Co., the appellate court found that the lower court's special verdict questions were flawed because they did not submit all the material issues to the jury. 852 F.2d at 318. However, in Forbes, the District Court presented all material issues to the jury by asking both if political pressure had been applied to AETN and if AETN had not invited Forbes because of his views.

In Solis v. Rio Grande City Indep. Schools, 734 F.2d 243 (5th Cir. 1984), Appellant's Brief at 3, the special verdict interrogatory was flawed because it only asked the jury to consider the first question of the two-pronged Mt. Healthy test for reviewing public employees' First Amendment challenges to employment decisions. Solis, 734 F.2d at 246. The trial court in Forbes did not commit any such error.

Forbes inaccurately describes the holding in Wirtz v. International Harvester Co., 331 F.2d 462, 466 (5th Cir. 1964), cert. denied, 379 U.S. 845 (1964), where the court found error in a special verdict question that failed to use the precise statutory terminology applicable to a labor dispute. Wirtz is inapplicable because the jury questions in Forbes did not involve statutory language.

Forbes also argues that this case is unlike Economy Fire & Casualty v. Tri-State Ins. Co., 827 F.2d 373 (8th Cir. 1987), and Kostelecky v. NL Acme Tool, 837 F.2d 828 (8th Cir. 1988), each holding special verdict questions to be adequate. Both courts found that interrogatories submitted to juries were not misleading because they allowed the juries to review all the material facts at issue and

come to a conclusion on each issue. Economy Fire & Casualty, 827 F.2d at 376; Kostelecky, 837 F.2d at 832. Similarly, the interrogatories in Forbes required the jury to consider AETN's two distinct theories and come to a separate conclusion on each. There were no instructions linking the two questions together, nor any indication whatever that, if the jury answered no to interrogatory one, they had to answer no to interrogatory two. Moreover, the special verdict interrogatories assured precise findings of fact for appellate review.

B. Exclusion of Evidence Regarding Steve Barnes

Forbes also challenges the District Court's refusal to admit evidence of Steve Barnes' hostile attitude towards Forbes' views. Steve Barnes is the husband of Amy Oliver, who made the recommendation to Susan Howarth that Forbes not be invited to AETN's debate. Forbes contends that Barnes' hostility affected Oliver's decision to recommend against inviting Forbes. Appellant's Brief at 32. As evidence of Barnes' hostility, Forbes proffered only his own testimony and a videotape that was represented by Forbes to show Barnes' agitation when Forbes won the 1990 Republican primary for Lieutenant Governor. Tr. Trans. 404. The District Court ruled that the proffered evidence was irrelevant. Id.

Forbes contends that Adams v. Fuqua Indus., Inc., 820 F.2d 271 (8th Cir. 1987), Appellant's Brief at 32, sets out the standard of review of decisions on admissibility of evidence:

> We may only reverse a trial court's determination of the admissibility of evidence where there has been a clear abuse of discretion. Where the District Court excludes evidence of a critical nature, so that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted, the trial court has abused its discretion.

Adams, 820 F.2d at 273.

Adams was a products liability suit. The trial court did not allow the defendant to present rebuttal evidence to show that improvements the plaintiff claimed should have been to the product were unavailable when the product was made. Adams, 820 F.2d at 275. Unlike Adams, where the excluded evidence was critical to the defen[illegible]t's case, Forbes could not show that the evidence about Barnes was even marginally relevant, much less critical, to his case. Forbes could not prove that Oliver was aware of her husband's opinions regarding Forbes, or that Oliver had ever seen the videotape of Barnes that he wished to present, Tr. Trans. 323-25; so he could not show that Barnes' attitude affected Oliver's views or contributed at all to her recommendation against inviting Forbes to the debate. Under these circumstances, the District Court's exclusion was not a clear abuse of discretion, and should not be reversed.

Forbes also erroneously relies on Giove v. Stanko, 977 F.2d 413 (8th Cir. 1992), to support his claim that proof of Barnes' hostility would prove bias on the part of Barnes' wife, Oliver. Giove v. Stanko was a suit against a woman whose husband had defrauded his creditors. 977 F.2d at 415-416. The court found that the wife was part of the fraud, so that any transfer of property from her husband to her was void. Id. at 416-417. The husband's affidavit was admissible to prove his fraudulent intent in hiding assets from his creditors. Id. at 417. However, the court did not state that the affidavit was proof of the wife's fraudulent intent. The court found other evidence to show that the wife was aware of and involved in the fraud. Id. Thus, Giove does not support Forbes' argument that evidence of a husband's state of mind is admissible to prove his wife's state of mind.

Forbes also relies on Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993). Daubert concerned the appropriate standard for admissibility of scientific evidence, and thus is not directly applicable here. However, the Court states that the Federal Rules of Evidence have a liberal relevancy standard, and that, under Rule 401, relevant evidence is defined as "that which has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Daubert 113 S. Ct. at 2794 (citing Rule 401). Even

so, Forbes has not shown that evidence of Barnes' hostility is linked even tenuously to AETN's decision not to invite Forbes to the debate.

C. Refusal to Instruct the Jury on Punitive Damages

Forbes also claims that the District Court erred by not instructing the jury that they could award punitive damages. The general rule of the cases in Forbes' brief is that a jury can award punitive damages to redress a malicious or intentional violation of a person's constitutional rights by a government official. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (review of the damages award in a §1983 suit regarding the due process rights of suspended public school students); Carlson v. Green, 446 U.S. 14, 22 (1980) (review of one's ability to recover damages in a Bivens suit); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-267 (1981) (review of one's ability to obtain punitive damages against a municipality in a §1983 suit). The purpose of punitive damages is to punish the government actor for her malicious conduct and to deter others from engaging in similar conduct. Carey, 435 U.S. at 257, n.11.; City of Newport, 453 U.S. at 267-268.

However, Forbes submitted no evidence that any of the individual defendants maliciously or intentionally denied him his rights. The Court in Carey stated that punitive damages are not appropriate when there is no specific finding that defendants acted with "malicious intention to deprive [plaintiffs] of their rights or to do them other injury." Carey 435 U.S. at 257 n.11. Thus, the District Court did not err in refusing to instruct the jury on punitive damages.

CONCLUSION

Under the First Amendment and the Communications Act, AETN should not be required to present a rational, viewpoint-neutral justification for its editorial decisions about the 1992 debate. Rather, this Court should reconsider it earlier en banc decision, and hold that a state-entity public broadcast licensee has the same editorial prerogatives as non-state-entity public broadcast licensees and commercial licensees. Only if the state exerts political pressure to

interfere with the state-entity licensee's editorial processes, as carried out by the professional editors charged with making day-to-day programming decisions, would the First Amendment mandate a different result.

The jury found, and a careful study of the record confirms, that there is no evidence in this case of political interference by the State of Arkansas with AETN's journalistic decisions about the 1992 debate. Consequently, the District Court's instructions to the jury and its use of a special verdict form were proper. The decision below should be affirmed.

Respectfully submitted,

/s/

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Dated: November 20, 1995

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I certify that, this 20th day of November, 1995, true copies of the Brief and Appendix of the AETN Defendants in this case were sent by prepaid, First Class U.S. mail or delivered by hand to the following:

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No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

The Arkansas Educational Television Commission ("AETC") holds licenses from the Federal Communications Commission ("FCC") for the five noncommercial, educational ("public") television stations that comprise the Arkansas Educational Television Network ("AETN").

1. Is a debate between selected candidates chosen by a state-owned public broadcaster's professional editors, based on their informed judgment about newsworthiness, a nonpublic forum from which the editors may exclude a perennial candidate in whom the public has shown no interest?

2. Does the First Amendment protect the editorial judgments of a state public television network's professional editors who, free from political interference and following viewpoint-neutral policies, select the participating candidates to make the debate most useful and interesting to the viewers?

PARTIES TO THE PROCEEDING

In the Court of Appeals, the following were parties:

Appellant: Ralph P. Forbes

Appellees:
Arkansas Educational Television Commission
Arkansas Educational Television Network Foundation*
Dr. Caroline Whitson
Victor Fleming
Diane Blair
James Ross
Jerry Mcintosh
Lillian Springer
Lavenia Craig
Robert Doubleday
Susan J. Howarth
Amy L. Oliver Barnes

* The Arkansas Educational Television Network Foundation has no parent or nonwholly owned subsidiaries.

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The opinion of the Court of Appeals for the Eighth Circuit (App. 1a) is reported at 93 F.3d 497 (8th Cir. 1996). The United States District Court for the Western District of Arkansas did not render an opinion after the jury verdict in this case.

JURISDICTION

The court below issued its opinion on August 21, 1996, and Petitioner filed a timely Petition for Certiorari on November 19, 1996, which was granted on March 17, 1997. 117 S. Ct. 1243 (1997). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the district court was invoked under the First Amendment to the United States Constitution and 28 U.S.C. § 1331 (general federal question jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The constitutional and statutory provisions involved are reproduced in the Appendix to the Petition. They are: sections of the Arkansas Code Annotated, ARK. CODE ANN. §§ 6-3-101 to 6-3-113, 25-16-804 (App. 47a, 56a); the First Amendment to the United States Constitution (App. 58a); the Communications Act of 1934, as amended, Sections 3(h), 309(a), 312(a)(7), 315(a), and 402(a) (codified at 47 U.S.C. §§ 153(h), 309(a), 312(a)(7), 315(a), and 402(a) (1996)) (App. 58a); and the rules of the Federal Communications Commission, 47 C.F.R. §§ 73.1941, 73.1944 (App. 61a).

STATEMENT OF THE CASE

A. Nature of the Case

Petitioner Arkansas Educational Television Network ("AETN" or the "Network") operates a network of five noncommercial educational ("public") television stations. Its Executive Director and other employees must regularly exercise their editorial judgment as journalists to decide what programming should be carried on the Network. Often that programming is about issues of local public interest. The programming may be about subjects or at a level of depth that commercial broadcasters do not usually offer. Indeed, the very premise of public broadcasting is to make such programming available. Although AETN is an agency of the State of Arkansas, there are legal and structural safeguards designed to ensure that the professional staff makes those editorial judgments free of interference from the state.

This case raises the question whether the First Amendment forbids AETN from exercising journalistic judgment. The particular facts of this case involve a debate among candidates for the House of Representatives, but the case implicates all of AETN's public interest programming. *See Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 652 (1981) (court should consider the disorder that would result from granting any speaker access, not just the disorder caused by the petitioning speaker). The fundamental issue is whether a member of the public, or the judiciary, may supplant the editorial judgment of AETN's professional staff about particular AETN programming.

B. Procedural History

AETN planned to broadcast a debate among selected congressional candidates to be held on October 22, 1992. After assessing the public's interest in each of the candidates, AETN's Executive Director Susan Howarth concluded that petitioner Ralph P. Forbes was not newsworthy enough to be invited to the debate. She determined that Mr. Forbes' candidacy had generated little or no public support, and therefore she concluded that AETN's viewing audience would be better served if the time available for the debate were devoted to candidates in whom the public was interested. She notified Mr. Forbes that he would not be invited to participate.

On October 19, 1992, three days before the debate, Mr. Forbes sued the Arkansas Educational Television Commission ("AETC"), its members, its Executive Director, certain AETN staff (collectively, the "AETN Defendants") and others in the United States District Court for the Western District of Arkansas. (J.A. 14) He alleged that, because he was qualified for the ballot as an independent candidate, he had a right to be included in the debate. Mr. Forbes alleged that AETN's decision not to invite him violated the Civil Rights Act, 42 U.S.C. §§ 1981 *et seq.*, and his First Amendment rights. He sought declaratory and injunctive relief and damages.

Mr. Forbes' motion for a preliminary injunction to be included in the debate was denied by the District Court on October 20, 1992. On October 21, 1992 and October 22, 1992, respectively, the Chief Judge and a panel of the Eighth Circuit denied Mr. Forbes' request for an injunction pending appeal.

(App. 45a, 43a)[1/] The court based its decision in part on *DeYoung v. Patten*, 898 F.2d 628, 632-33 (8th Cir. 1990), which held that Iowa's state-owned public television network is not a public forum for First Amendment purposes, and that candidates do not have a First Amendment right to appear in political debates on a state-owned public television station. (App. 44a, 46a) The debate was broadcast without Mr. Forbes' participation on October 22, 1992.

One week after the election, the AETN Defendants filed a motion to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(6). The District Court granted the motion and dismissed the complaint on December 16, 1992.

Mr. Forbes appealed, and on April 28, 1994, the Eighth Circuit, *en banc*, affirmed in part and reversed in part. *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir.) (*en banc*) ("*Forbes I*") (App. 25a), *cert. denied*, 513 U.S. 995 (1994) (petition of AETN), 115 S. Ct. 1962 (1995) (petition of Mr. Forbes). The Eighth Circuit held that "Forbes alleged a First Amendment violation well enough to survive a motion to dismiss" (App. 32a), overruling the panel decision in *DeYoung v. Patten*. The court left open whether AETN's debate was a limited public forum or a nonpublic forum. *Forbes I* (App. 35a).

Trial was held on Mr. Forbes' First Amendment claim from June 5 to 7, 1995. The District Court instructed the jury that the debate was a nonpublic forum as a matter of law. On

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1/ "App." refers to the appendix to the Petition for Certiorari; "J.A." refers to the Joint Appendix; "Tr." refers to the transcript of the trial held June 5-7, 1995; "DX" refers to defendants' trial exhibits.

June 7, 1995, the jury returned a special verdict in favor of the AETN Defendants, finding that (1) AETN's decision not to invite Mr. Forbes was not influenced in any way by political pressure, and (2) the decision was not made because of AETN's objections or opposition to Mr. Forbes' views. (App. 22a-23a) The District Court entered judgment in favor of the AETN Defendants on June 7, 1995. (App. 21a)

Mr. Forbes appealed, and on August 21, 1996, a panel of the Eighth Circuit reversed. *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*"). (App. 1a) The Eighth Circuit held that the debate was a limited public forum because the debate "was staged in order for the candidates to express their views on campaign issues" (App. 14a-15a), and because "AETN, by staging the debate, opened its facilities to a particular group — candidates running for the Third District Congressional seat." *Id.* The Eighth Circuit also held that AETN's reason for excluding Mr. Forbes — that Mr. Forbes was not a "viable" candidate, a term used by the court — was not legally sufficient as applied to a limited public forum. (App. 16a-17a) The Eighth Circuit declared:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. . . . But . . . the people making this judgment were not ordinary journalists: they were employees of government. . . . A journalist employed by the government is still a government employee.

Id.

On November 19, 1996, the AETN Defendants filed with this Court a Petition for a Writ of Certiorari. The Petition was granted on March 17, 1997.

C. Statement of the Facts

1. The Structure of AETC and AETN

AETC operates the Network, five interconnected noncommercial educational television stations licensed to AETC by the Federal Communications Commission ("FCC"). (Tr. 183 (S. Howarth), J.A. 108) Although AETC is an agency of the State of Arkansas (ARK. CODE ANN. § 6-3-101 (Michie 1994) (App. 47a)), there are statutes designed to protect programming decisions from political pressure from the state. The eight members of AETC are appointed by the Governor with the advice and consent of the state Senate for terms of eight (8) years (eligible for reappointment), and, once appointed, they may be removed only for good cause. *Id.* §§ 6-3-102(a)(1), 6-3-102(b)(1), 25-16-804(b)(1) (App. 47a, 48a, 56a). Except for educators in the state's public schools or institutions of higher learning, the members may not hold any other state or federal office, nor hold employment paid in whole or part by funds derived from tax sources. *Id.* § 6-3-102(a)(3) (App. 47a). The members of AETC appoint the Executive Director of AETC and AETN. *Id.* § 6-3-104 (App. 49a). The Executive Director is Susan Howarth. (Tr. 184 (S. Howarth), J.A. 108)

In addition to the statutory protections, AETC has adopted structural rules to ensure that programming decisions are based on professional editorial judgment free of political pressure from the state. In June 1988, AETC adopted the *Programming Policy Statement for AETN*. (Tr. 187, 194 (S. Howarth), J.A. 110, 115; DX 4, Tr. 179, 186, App. 96a) In that policy, AETC delegates to its Executive Director the authority to make programming decisions for the Network. (DX 4 § 1, Tr. 179, 186, App. 96a) In effect and practice, the *Programming Policy Statement* makes the Executive Director the "editor-in-chief"

of the Network. (*Id.*; Tr. 184 (S. Howarth), J.A. 108) Furthermore, the *Programming Policy Statement* authorizes the Executive Director to "delegate the exercise of this authority to professional staff based on informed programming discretion." (DX 4 at 1, Tr. 179, 186, App. 96a)

The *Programming Policy Statement* emphasizes the importance of the educational and other valuable programming that AETN provides:

> AETN furthers the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time.
>
> * * * *
>
> Locally-produced programs relevant and responsive to Arkansas needs, problems, issues, and concerns are a very important part of a comprehensive broadcast schedule tailored to the interests of the people of this state.

(DX 4 §§ 10, 14, Tr. 179, 186, App. 100a, 101a) To accomplish those goals free of political pressure, the *Programming Policy Statement* also describes how the independent structure of AETN insulates the editorial decisions of AETN's professional journalists and programmers:

> AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources.

> AETN bases its public service programming on its value in the marketplace of ideas; not in financial considerations or commercial pressures.

(DX 4 § 6, Tr. 179, 186, App. 98a-99a)

In addition to the *Programming Policy Statement*, AETC also follows the *Statement of Principles of Editorial Integrity in Public Broadcasting*. (App. 64a; Tr. 194 (S. Howarth), J.A. 115) Those *Principles of Editorial Integrity* were developed at a nationwide conference of public broadcasters. The conference "was convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in the light of past legal decisions and legislative actions." (DX 8 (*Principles of Editorial Integrity*) at 17, Tr. 179, 193, App. 87a) The conferees, including representatives of AETC, were concerned about constitutional issues that might arise when state-owned broadcasting stations exercise editorial judgment. Consequently, they drafted the *Principles of Editorial Integrity* to "help to guarantee public broadcasting's editorial integrity in the future." (*Id.*) Editorial integrity in public broadcast programming is defined as "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." (*Id.* at 3, App. 69a)

To insulate public broadcasters' programming from political pressure, the *Principles of Editorial Integrity* declares:

> The process of developing programs . . . must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure

> from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

(*Id.* at 14, App. 82a) Pursuant to the *Principles of Editorial Integrity*, AETC makes all editorial decisions independent of the state. The journalistic process is deliberately protected from the political and administrative processes of the state.

2. AETN's Decision To Produce Debates for the 1992 Elections

In fulfillment of AETN's mission to provide valuable programming to the people of Arkansas about current issues of local interest, the Network began planning to produce debates for the 1992 federal elections. From the outset, the planning for the debates was done by AETN's professional staff with assistance from respected outside journalists. Carole Adornetto, Production Director at AETN, instructed Amy Oliver, Production Manager at AETN, to work with Bill Simmons, Chief of the Associated Press (the "AP") in Little Rock. (Tr. 195 (S. Howarth), J.A. 115; Tr. 292 (A. Oliver), J.A. 139-140; DX 15, Tr. 179, 292) Mr. Simmons, a respected journalist, was a consultant to AETN. AETN worked with Mr. Simmons because he "brought so much credibility" and because "he brought a lot to the process because of his — his background and his experience." (Tr. 195-96 (S. Howarth), J.A. 116)

AETN planned one debate for the senatorial race in Arkansas and one debate for each of the four congressional races in Arkansas. Each debate was to last one hour, which meant that, after introductory and closing material, there would

be only about 53 minutes available for the actual discussion by, and questioning of, the candidates. (Tr. 200 (S. Howarth), J.A. 119) AETN designed the debates to serve its viewers by providing a detailed discussion of the issues that were of greatest interest and importance to them. (Tr. 198-201, 207-08 (S. Howarth), J.A. 117-19, 123-24) The addition of a third-party candidate in whom the public had shown little interest would significantly dilute the time available for discussion of issues by the candidates in whom the viewing audience was interested. (Tr. 201 (S. Howarth), J.A. 119)

3. The Forbes Campaign

Respondent Forbes decided to run as an independent candidate for the United States House of Representatives from Arkansas' Third Congressional District in the 1992 elections. *See* Deposition of Ralph P. Forbes, dated April 13, 1995 ("Forbes Dep."), at 16-17.[2/] Under Arkansas' lenient rules, Mr. Forbes needed the signatures of only 2,000 qualified electors for his name to appear on the ballot. ARK. CODE ANN. §§ 7-7-101, 7-7-103(c)(1); Forbes Dep. 17-18. Even so, Mr. Forbes had great difficulty obtaining enough signatures to be certified. He had approximately 50 volunteers who worked "very part-time" helping him gather the required signatures. (Forbes Dep. 43) Most of his volunteers "weren't that productive." (*Id.*) Consequently, Mr. Forbes "realized it's more productive . . . to just get [the signatures] [himself] rather than try to . . . organize people to help [him]." (*Id.*) So, Mr. Forbes went out seeking signatures many times from dawn until

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2/ Mr. Forbes' deposition is found at tab 7 to Defendants' May 15, 1995 *Memorandum of Law in Support of Defendants' Motion for Summary Judgment*, filed in the District Court on May 16, 1995.

dusk, and he found it was not easy to get signatures. (*Id.* at 17) After two unsuccessful attempts, Mr. Forbes finally obtained enough signatures to be certified in August 1992. (*Id.* at 17, 43)

Mr. Forbes had a history of unsuccessful campaigns for public office that had generated little or no public interest. In 1985, Mr. Forbes ran for the school board in Pulaski County, Arkansas, but he "didn't have hardly any votes." (Tr. 144 (R. Forbes), J.A. 89; Forbes Dep. 13) In 1986, he ran in the Republican primary election for Lt. Governor of Arkansas, but lost. (Tr. 144 (R. Forbes), J.A. 89-90; Forbes Dep. 14) In 1986, he ran for the United States Senate, but he received only 52 votes out of 695,487 votes cast, or 0.01%. (DX 17 at 2, Tr. 179, 300; Tr. 300 (A. Oliver), J.A. 145) He received a plurality in the May 1990 Republican primary for Lt. Governor, a three way race, but then lost in the June 1990 Republican primary run-off election for Lt. Governor. (Tr. 146 (R. Forbes), J.A. 91; Forbes Dep. 15) In that election, he received only 4,431 votes out of the 31,980 votes cast, or 13.86%. (DX 18 at 41, Tr. 179, 300; Tr. 300-01 (A. Oliver), J.A. 145) In fact, in the 1990 Republican primary run-off election, Mr. Forbes did not win a single one of Arkansas' 75 counties. (DX 18 at 42, Tr. 179, 300; Tr. 301 (A. Oliver), J.A. 145-46; Forbes Dep. 16)

Mr. Forbes' 1992 campaign generated no discernable interest among the people of the Third District. Mr. Forbes himself described his campaign organization as "bedlam." (Tr. 146-47 (R. Forbes), J.A. 91; Forbes Dep. 42) "A lot of people that had volunteered just weren't there in reality. And it was like some of my other campaigns, it boiled down to a one or two man campaign towards the end." (Forbes Dep. 44-45; Tr. 147 (R. Forbes), J.A. 91) Mr. Forbes had no paid campaign staff. (Forbes Dep. 50) Other than his family, he had no volunteer staff who worked full-time or near full-time. (*Id.*)

There were "some or a few" part-time workers who put a significant effort into his campaign, but not a "substantial" number. (*Id.*)

Mr. Forbes used his house as his campaign headquarters. (Tr. 147 (R. Forbes), J.A. 91; Forbes Dep. 45) He testified that "wherever [he] was was the headquarters." *Id.*

Mr. Forbes raised relatively little money for his 1992 campaign. (Tr. 148 (R. Forbes), J.A. 91-92; Forbes Dep. 45) He raised less than $10,000, which he admitted "wasn't very much by politician standards." (Tr. 148 (R. Forbes), J.A. 92; Forbes Dep. 45; DX 21, Tr. 179, 302) In contrast, Mr. Forbes' opponents, Tim Hutchinson and John VanWinkle, raised approximately $371,000 and $431,000, respectively. (DX 19, Tr. 179, 302; DX 20, Tr. 179, 301; Tr. 301-02 (A. Oliver), J.A. 146) Mr. Forbes testified that, although he tried to raise more money, he was not successful because "[m]any people weren't aware that [he] was running." (Forbes Dep. 50)

Mr. Forbes testified that he was not well known because he did not buy enough advertisements. (Tr. 148 (R. Forbes), J.A. 92; Forbes Dep. 46-47) Mr. Forbes testified that he did not get nearly the coverage he needed in order to attract enough votes to win. (Tr. 148-49 (R. Forbes), J.A. 92-93; Forbes Dep. 49) By way of analogy, Mr. Forbes stated that he "wasn't even a flea scratching an elephant." (Forbes Dep. 49; Tr. 150 (R. Forbes), J.A. 93)

Mr. Forbes' campaign appearances generated no appreciable public interest. He did not remember *ever* speaking to any large groups during his campaign. (Tr. 155 (R. Forbes), J.A. 97; Forbes Dep. 55) He never held rallies. (Tr. 155 (R. Forbes), J.A. 96; Forbes Dep. 54) Indeed, he received only one or two invitations to speak at meetings, which he declined.

(Forbes Dep. 51-52; Tr. 172-73 (R. Forbes), J.A. 107) He testified:

> We kept trying to find out where — for whatever reason, I don't know the reason, but the people that were inviting my two opponents [to speak] were not inviting me. I have no way of knowing why. It's just a fact, and we kept trying to find out where they were going but we always — it was too late to — to meet them or become part of that.

(Tr. 173 (R. Forbes), J.A. 107; *see* Forbes Dep. 52)

None of the media felt his campaign was of sufficient interest to cover. Mr. Forbes described the press coverage of his campaign as "zilch." (Tr. 154 (R. Forbes), J.A. 96; Forbes Dep. 56) When asked whether any reporters traveled with him, Mr. Forbes responded, "Absolutely not." (Tr. 153 (R. Forbes), J.A. 95; Forbes Dep. 53) He testified:

> I was told by many people that there was a general consensus that we were non-persons. We didn't exist. Our campaign didn't exist and it was generally agreed by everyone that no matter what I did, if I ran around in a flaming war bonnet naked, jumping off towers it would be not newsworthy, and the odd part about one thing I do recall I think it's 'Asahi' or however they pronounce it. It's the largest Japanese news media in the country, meaning Japan, kept calling me. They wanted to come down and film my campaign. I had to keep telling them I'm sorry, there's nothing to film.

(Tr. 153 (R. Forbes), J.A. 95; Forbes Dep. 52) In contrast, the major party candidates were "getting statewide coverage." (Forbes Dep. 55-56)

Mr. Forbes testified that it would have taken a miracle to win the 1992 election. (Tr. 162 (R. Forbes), J.A. 100; Forbes Dep. 82) Ultimately, Mr. Forbes received only 2.5% of the vote in the 1992 election. (DX 22 at 49, Tr. 179, 302, J.A. 172; Tr. 303 (A. Oliver), J.A. 147)

4. Mr. Forbes' Request to Participate in the Debate

On June 17, 1992, Mr. Simmons of the AP sent invitations to each of the major candidates in the Senate and House races, inviting them to participate in the televised debates to be aired on AETN. For the debate concerning the Third Congressional District, invitations were sent to Mr. VanWinkle, the Democratic candidate, and Mr. Hutchinson, the Republican candidate. At the time the invitations were sent, they were the only qualified candidates running for this seat; Mr. Forbes did not qualify until two months later. (Forbes Dep. 17, 24-25) By letter dated August 24, 1992, Mr. Forbes requested that he be included in the debate. (DX 11, Tr. 179, 197, App. 105a)

AETN and Mr. Simmons considered whether to invite Mr. Forbes to participate in the debate. The feeling among both the professional staff at AETN and Mr. Simmons was that, with only 53 minutes for the actual debate, time was a precious commodity; if there were too many participants in each debate, there would not be enough time for each candidate to discuss the issues in-depth, in a meaningful manner. They felt that the debates would not be worthwhile if the candidates had time only to make short, superficial statements about important issues. Thus, they concluded that, to offer an informative debate that would serve the viewers best, the issues should be discussed in-depth by those candidates who were receiving serious support from the public. (Tr. 198-201, 207-08 (S. Howarth), J.A. 117-19, 123-24; Tr. 293 (A. Oliver), J.A. 140)

Ms. Howarth was also concerned that AETN might lose credibility among its viewing audience if the debate included a candidate whom the public did not take seriously. (Tr. 207-08 (S. Howarth), J.A. 123-24)

Ms. Oliver made a recommendation about whom to invite to the debate. She carefully conducted thorough research about Mr. Forbes' campaign to determine whether he was a candidate who was generating popular support. (Tr. 297-98 (A. Oliver), J.A. 142-43) Ms. Oliver used her professional journalistic judgment in making that evaluation. She consulted with Mr. Simmons, as well as other journalists, to get an assessment of how politicians and knowledgeable political observers in Arkansas viewed Mr. Forbes. (Tr. 294-95, 296, 297-98, 298-99 (A. Oliver), J.A. 141, 142, 143-44; Tr. 200, 202, 212-14 (S. Howarth), J.A. 118, 120, 127-28) Mr. Simmons' professional judgment was that Mr. Forbes had no popular support and that he should not be invited to participate in the 1992 debate. (DX 16, Tr. 179, 294)

Ms. Oliver considered that:

- Mr. Forbes raised a very small amount of money for his campaign. (Tr. 148 (R. Forbes), J.A. 92; DX 13, Tr. 179, 211; DX 14, Tr. 179, 213; DX 16, Tr. 179, 294)

- Mr. Forbes did not have any paid or volunteer campaign staff. (Forbes Dep. 50)

- Mr. Forbes did not have campaign headquarters, other than his house. (Tr. 147 (R. Forbes), J.A. 91; Tr. 199, 202, 213 (S. Howarth), J.A. 118, 120, 127; DX 13, Tr. 179, 211)

- Mr. Forbes had little popular support among the voters of the Third District, and AETN's viewing audience therefore had no appreciable interest in seeing him. (Tr. 198-99, 201 (S. Howarth), J.A. 117-18, 119; TR. 295, 299, 304 (A. Oliver), J.A. 141, 144, 147)

- Other professional political journalists did not consider Mr. Forbes to be a significant participant in the race for the House of Representatives. (Tr. 296 (A. Oliver), J.A. 142; DX 13, Tr. 179, 211; DX 14, Tr. 179, 213)

- Other professional journalists did not even plan to report Mr. Forbes' name in the election night results. (Tr. 199-200 (S. Howarth), J.A. 118; Tr. 298-99 (A. Oliver), J.A. 144; DX 13, Tr. 179, 211)

- Mr. Forbes was a perennial candidate who had received no appreciable support. In his best prior showing in the 1990 primary run-off for Lt. Governor, he did not win any of the 75 counties in Arkansas. (*See* Tr. 300-01, J.A. 145-46; DX 18 at 42, Tr. 179, 300; DX 13, Tr. 179, 211)

In summary, Ms. Oliver concluded that Mr. Forbes was not a "serious candidate," and that the viewing audience was not interested in seeing Mr. Forbes. (DX 13, Tr. 179, 211; DX 14, Tr. 179, 213; DX 16, Tr. 179, 294) Accordingly, Ms. Oliver recommended not inviting Mr. Forbes to participate in the debate.

Ms. Adornetto and Ms. Howarth, using their professional journalistic judgment, agreed. (*See* Tr. 298 (A. Oliver), J.A. 143-44) Ms. Howarth notified Mr. Forbes of her decision not

to invite him in a letter dated September 4, 1992. (*Id.*; DX 12, Tr. 179, 205, App. 103a)

The decision not to invite Mr. Forbes to participate in the debate was based on the professional editorial judgment of Ms. Howarth and her colleagues. The jury specifically found that the AETN Defendants did not exclude Mr. Forbes "because of objections or opposition to his views" (App. 23a), and that finding is amply supported by the record. (*E.g.*, Tr. 210 (S. Howarth), J.A. 125; Tr. 295-96, 345 (A. Oliver), J.A. 142, 154) The jury also found that the decision to exclude Mr. Forbes was not "influenced *in any way* by political pressure from anyone inside or outside of the Arkansas Educational Television Network." (App. 22a, emphasis added) That finding too is well supported by the record. (*E.g.*,Tr. 209-10 (S. Howarth), J.A. 124-25; Tr. 304 (A. Oliver), J.A. 147) The decision was a professional journalistic decision of the kind that journalists, like those at AETN and the AP, make routinely.

SUMMARY OF THE ARGUMENT

Every broadcasting station is licensed under the Communications Act on the premise that the licensee will at all times maintain editorial control of programming. The tradition and nature of broadcasting as an editorial enterprise support the premise that the licensee, when presenting a news program such as a debate, will control the subject matter, including the selection of guests. The evidence in this case proves that AETN did not intend to open the debate to all qualified candidates, but only to candidates judged by the network's editors to be newsworthy, and hence of interest to the audience. Consequently, the debate was a nonpublic forum, and AETN reasonably excluded Mr. Forbes because he was not newsworthy. The jury found that Mr. Forbes was not excluded because of his views.

Even if this Court were to hold that the debate was a limited public forum, the decision below is still erroneous. Arkansas has a compelling state interest to provide to its citizens the unique programming available on public television, including debates among candidates in whom the viewing audience is interested. Accomplishing that compelling interest requires that the broadcaster be allowed to make editorial judgments about programming, as this Court has recognized. In short, editorial freedom is essential to meet the compelling state interest. AETN's selection of the debate participants was narrowly tailored to that interest. It was made only after careful investigation by AETN's journalists. And their decision was limited to factors properly considered by an editor, and was not influenced by political pressure, bias against Mr. Forbes' viewpoint, or a desire to promote another candidate.

Alternatively, the First Amendment protects the exercise of editorial judgment by AETN's Executive Director. The jury found that AETN's decision not to invite Mr. Forbes was not influenced by political pressure. AETC's policies establish AETN as an institution of the free press. They create structural safeguards against application of political pressure to influence the editorial decisions of AETN's professional journalists. The safeguards are a state-level complement to the structural protections enacted by Congress for public broadcasting and analyzed in *FCC v. League of Women Voters*, 468 U.S. 364, 394 (1984) ("*League of Women Voters*"). Because AETN's Executive Director functions in an editorial role that is independent of, and inherently adversarial to, the state, the decisions of this Court support protecting her editorial decisions under the First Amendment.

ARGUMENT

This Court evaluates the public's First Amendment right of access to government property by analyzing the nature and character of the property. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800-01 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983). Under *Cornelius*, the government's intent is the starting point in forum analysis, because "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." 473 U.S. at 802. Analyzing intent is crucial, because the "State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)); *Perry Educ. Ass'n*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 800. The "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The state must have "substantial discretion" in determining how to allocate scarce resources to accomplish its mission. *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S. Ct. 2510, 2518 (1995).

The Court uses a forum analysis to determine into which of three categories the property at issue falls. The first category is the public forum. It is property "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Educ. Ass'n*, 460 U.S. at 45. In a public forum, the state's right to limit expressive activity is sharply circumscribed. *Id.* There is no dispute that the debate at issue here is not a traditional public forum.

The second category is the limited public forum. It is a forum "which the State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n*, 460 U.S. at 45. The state may confine the limited public forum to the limited and legitimate purposes for which it was created. *Rosenberger*, 115 S. Ct. at 2516. Within those confines, the state's restrictions must be narrowly drawn to effectuate a compelling state interest. *Perry Educ. Ass'n*, 460 U.S. at 46. The court below found that the debate was a limited public forum, and that the exclusion of Mr. Forbes was not narrowly tailored to effectuate a compelling state interest. (App. 14a, 17a)

The third category is the nonpublic forum. *Perry Educ. Ass'n*, 460 U.S. at 46. It is property that "is not by tradition or designation a forum for public communication." *Id.* In a nonpublic forum, the state may restrict access as long as the restrictions are reasonable and are not made to suppress the speaker's viewpoint. *Cornelius*, 473 U.S. at 800. In this case, the district court instructed the jury that the forum was a nonpublic forum, and the court of appeals reversed on that ground.

I. AETN'S DEBATE WAS A NONPUBLIC FORUM. ITS DECISION TO EXCLUDE MR. FORBES WAS REASONABLE AND NOT MADE TO SUPPRESS HIS VIEWPOINT.

AETN asserts that the debate and, indeed, all of AETN's program schedule, are nonpublic fora. This Court recognizes that "[n]ot every instrumentality used for communication . . . is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. The fact that "[expressive] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First

Amendment purposes." *Id.* at 805. Rather, whether a forum is a limited public forum turns on the state's intent to open the forum for public discourse:

> [T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with [the] expressive activity to discern the government's intent.

Id. at 802 (citations omitted). This Court emphasizes that it "will not find that a public forum has been created in the face of clear evidence of a contrary intent." *Id.* at 803. Nor will the Court "infer that the government intended to create a public forum when the nature of the property is inconsistent with the expressive activity." *Id.* Thus, the Court has repeatedly found that fora created for expressive activities were not limited public fora when the government did not intend one to be created. *See Perry Educ. Ass'n*, 460 U.S. at 46 (school's mail facilities not a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-04 (1974) (advertising space on city buses not a public forum).[3/]

3/ *See also Barnard v. Chamberlain*, 897 F.2d 1059, 1065-66 (10th Cir. 1990) (state bar publication is nonpublic forum, and plaintiff has no right of access to publish there); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381 (5th Cir. 1989) (same); *Avins v. Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967) (refusal of state university law review editors to accept article for publication did not violate author's First Amendment rights), *cert. denied*, 390 U.S. 920 (1968).

The court of appeals held that the debate itself was the forum, relying on the statement in *Cornelius,* 473 U.S. at 801, that the forum is defined in terms of the access sought by the speaker. (App. 12a-13a) Yet AETN's obligation to maintain editorial control applies to all its programming:

> A basic premise of Commission policy is that a licensee is a "trustee" for the public, and that he must therefore assume the "primary duty and privilege to select the material to be broadcast to his audience. . . ." "The [Federal Communications] Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee."

Cosmopolitan Broad. Corp. v. FCC, 581 F.2d 917, 921 (D.C. Cir. 1978) (citations omitted), *rev'g on other grounds Cosmopolitan Broad. Corp.*, 59 F.C.C.2d 558 (1976); *see also Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (the FCC "fulfilled its statutory obligations by promulgating regulations which view licensees as having the sole right and nondelegable responsibility to select the programs to be broadcast"), *cert. denied*, 460 U.S. 1023 (1983).

Under the Communications Act, 47 U.S.C. §§ 151 *et seq.*, and the rules and policies of the FCC, all AETN's programming must remain at all times under AETN's editorial control. The only exception is for "uses" by political candidates under the "equal opportunities" provision of the Communications Act, 47 U.S.C. § 315 (App. 59a-60a), and the "reasonable access" provision that applies to federal candidates, 47 U.S.C. § 312(a)(7) (App. 59a), discussed in greater detail *infra* at note 7 and accompanying text. Consequently, the

nonpublic forum nature of the Network's overall schedule dictates that each program also be a nonpublic forum.

To determine whether a forum is public or nonpublic, the Court considers "the nature of the property and its compatibility with expressive activity to discern the government's intent." *Cornelius*, 473 U.S. at 802. The property here is a broadcast station, whose programming is not traditionally open to participation by the public. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973) ("*CBS v. DNC*"); *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981) ("Petitioners are correct that the Court has never approved a *general* right of access to the media."). That is as true of public television stations licensed to state entities as it is of public stations licensed to non-state corporations or to commercial stations.[4/] The Court recognizes that the broadcast media pose unique physical limitations that necessarily restrict the broadcaster to one program or one speaker at a time. *CBS v. DNC*, 412 U.S. at 101.

4/ *See Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486, 488-89 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991); *Schneider v. Indian River Community College Found., Inc.*, 875 F.2d 1537, 1541 (11th Cir. 1989); *Muir*, 688 F.2d at 1040; *DeYoung v. Patten*, 898 F.2d 628, 630 (8th Cir. 1990), *overruled by Forbes I*; *see also League of Women Voters*, 468 U.S. at 394 ("Congress. . . imposed no special requirements to restrict state or local control over these [state-entity licensed] stations. . . .").

A. The Debate was a Nonpublic Forum.

The uncontradicted evidence shows that AETN did not intend to create a limited public forum. Rather, AETN intended to create a nonpublic forum for *selected* candidates who its professional staff concluded were newsworthy to the viewing audience. This Court has held that "[s]uch *selective* access, unsupported by evidence of a purposeful designation for public use, *does not create a public forum*." *Cornelius*, 473 U.S. at 805 (emphasis added). A public forum is not created by permitting "limited discourse" but requires opening the forum to "public discourse." *Id.* at 802.

The uncontradicted evidence shows that the debate was intended for *selected* participants and was not opened to public discourse. Ms. Howarth testified that "the debates were designed to benefit the viewers of AETN in the Third Congressional District." (J.A. 117) Her staff consulted Mr. Simmons, a respected journalist with the Associated Press, and together they researched whether Mr. Forbes' inclusion would be newsworthy to the viewers. They found that Mr. Forbes was a perennial candidate who garnered little or no public support in his past campaigns, that the public donated very little to his campaign, that he did not have a campaign headquarters, and that he did not have any paid or full-time volunteer staff. (J.A. 118, 141, 142-43, 143-44) Mr. Forbes' campaign generated so little public interest that he never spoke at any rallies or before large groups. (J.A. 96-97; Forbes Dep. 55) Indeed, he even declined the one or two invitations he received to speak at meetings. (J.A. 107; Forbes Dep. 51-52) The AP did not even plan to report Mr. Forbes' name in the election night results. (J.A. 118, 144) AETN's professional staff concluded among other things that Mr. Forbes had no practical chance of winning. (J.A. 118-19, 141-44)

Because Mr. Forbes did not have any "serious support among the constituents, the voters" (J.A. 119), AETN's professional staff made the judgment that the program would be of greater interest and service to viewers in the Third District if it included only the two candidates who had demonstrable public support, the major party candidates. Otherwise, the voters would have less opportunity during the limited time available to hear from the candidates in whom they were interested. (J.A. 117-19, 123-24, 140) Further, Ms. Howarth was concerned that AETN would lose credibility with its viewing audience — credibility that is essential to a news organization or a broadcaster — if it included a candidate whom the public did not take seriously. (J.A. 123-24) As Ms. Howarth testified:

> [I]f we included him in the debate and gave him equal status with the two other candidates and gave him an equal amount of time in the debate then that would have been breaching that trust with our viewers because it would be giving him a status that he had not earned through the support that he had from the voters.

(J.A. 123)

AETN's intent to create a nonpublic forum is further demonstrated by AETC's reposing editorial control in the Executive Director, Ms. Howarth. The *Programming Policy Statement* (App. 96a) designates the Executive Director as the "editor" who is delegated the responsibility for making programming decisions. She must make her decisions

> based on informed programming discretion founded upon the Commission's mission statement, determinations of Arkansas needs, problems, and

> interests, seasoned judgment, media research, mail/phone comments from viewers and the public, and consultation with television programming experts.

(App. 96a) The *Programming Policy Statement* instructs the Executive Director to maintain "editorial integrity." (App. 98a-99a)

AETN's intent is further demonstrated by one of the most important organic documents in this field, the *Principles of Editorial Integrity*. (App. 64a) It declares:

> Editorial integrity in public broadcasting programming means the *responsible application by professional practitioners of a free and independent decision-making process* which is ultimately accountable to the needs and interests of all citizens.
>
> * * * *
>
> The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

(App. 69a, 82a (emphasis added)) AETC's adoption of this policy evinces an unambiguous intent that its Executive Director function as an "editor" and control the content of its programming.

That AETN intended the debate to be for *selected* candidates chosen on the basis of newsworthiness[5/] — and therefore not to make it a public forum — is further demonstrated by the fact that Ms. Howarth planned to satisfy the FCC's requirements for an "exempt" debate. (App. 103a) Under Section 315 of the Communications Act, 47 U.S.C. § 315 (App. 59a-60a), a candidate has a right to demand "equal opportunities" unless the debate is designed to meet the requisites of "on-the-spot coverage of a bona-fide news event" under Section 315(a)(4) of the Communications Act.[6/] For a debate both sponsored and broadcast by the licensee, those requirements are:

5/ "Newsworthiness" as a standard for decision-making among journalists generally, and among broadcast editors specifically, was recognized in *CBS v. DNC*, 412 U.S. at 119 ("Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness."). *See also Marcus v. Iowa Pub. Television*, 93 F.3d 1137, 1143-44 (8th Cir. 1996) (broadcaster and expert witness discussion of newsworthiness).

6/ The FCC's standards for exempt debates apply to privately and publicly owned licensees alike. *See Johnson v. FCC*, 829 F.2d 157, 160-63 (D.C. Cir. 1987) (third party candidate's request for access to debate on a commercial station held to be inconsistent with Congress' decision to promote coverage of political news and preserve First Amendment rights of broadcasters); *Jim Trinity*, Letter, 7 FCC Rcd 3199 (1992) (state university licensee); *Arthur R. Block*, Letter, 7 FCC Rcd 1784 (1992) (community licensee and state university licensee).

- The participants in the debate must be selected by the licensee in the exercise of its bona fide editorial judgment.

- The decisions regarding the debate cannot be made for the purpose of advancing any particular candidacy.

See generally Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd mem.*, *League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984). This debate met those requirements, *see* 47 C.F.R. § 73.1941(a)(4) (App. 61a-62a); *Political Primer 1984*, 100 F.C.C.2d 1476, 1502-03 (1984). In any event, Mr. Forbes chose not to exercise his right under FCC rules to challenge whether the debate was exempt. (J.A. 98-99)

The fact that the debate was exempt under Section 315 and the FCC's rules offers further proof that the debate must be a nonpublic forum. For a broadcaster to meet the requirements of a "bona fide news event," the broadcaster *must* exercise editorial judgment to decide whom to invite to participate, *see* 47 C.F.R. § 73.1941(a)(4) (App. 61a-62a). Further, the exemptions to Section 315(a) and the FCC's rules implementing them are carefully structured to preserve licensees' exercise of news judgment. *See generally Chisholm*, 538 F.2d 349; *Geller*, 95 F.C.C.2d 1236. Because Ms. Howarth from the start intended the debate to be exempt (App. 103a), there cannot be any question that AETN did not intend to create a public forum. Thus, there is "clear evidence of a contrary intent" which precludes finding the debate to be a public forum. *See Cornelius*, 473 U.S. at 803.

In addition, this Court holds that, "where the principal function of the property would be disrupted by the expressive

activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Cornelius*, 473 U.S. at 804. *See also Greer v. Spock*, 424 U.S. 828 (1976) (military reservation); *Adderley v. Florida*, 385 U.S. 39 (1966) (jail house). In this case, the access Mr. Forbes seeks would disrupt the principal function of the expressive activity because it would significantly reduce the time available to the newsworthy candidates.

Further, the Court must consider not just the effect of granting access to Mr. Forbes but also the disruption that would occur if every other candidate sought access too. *See Heffron*, 452 U.S. at 652 ("The justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON."); *Perry Educ. Ass'n*, 460 U.S. at 52 n.12. If every candidate had a constitutional right to appear in a debate on public television, then public broadcasters would be flooded with requests for access. Moreover, some third party and perennial candidates seek attention by using disruption as a tactic. In either case, the views of the candidates in whom the viewing audience was most interested would drown in the cacophony. The program would be of little if any value to the public, viewers would tune out, and public broadcasters would abandon the effort. The primary goal of public broadcasting and, indeed, of the First Amendment — to encourage speech — would be disrupted.

The disruption would not be limited to programs called "debates." For example, it might include programs dealing with education, the environment, or military policy. Candidates are already seeking to apply the decision below to programs structured as bona fide news interviews under Section 315(a)(2) of the Communications Act, 47 U.S.C. § 315(a)(2) (App. 59a-60a). *Marcus*, 97 F.3d 1137. Indeed, it is unlikely that such a right of access could be limited to campaign debates. Public

broadcasters offer a wide variety of important programming about a panoply of local and national controversies. People and advocacy groups with a special interest would likely seek to enforce their access to programming about important topics. Broadcasters' editorial control would be unavailing and, with that, their capacity to present an editorial product would be hobbled to the point of destruction. "[The] concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action." *CBS v. DNC*, 412 U.S. at 121. In short, much of the valuable programming offered by AETN and other public broadcasters would be undermined if the programs were held to be limited public fora.

B. The Eighth Circuit's Forum Analysis Departs from *Cornelius* and Fails to Meet the Standards of *Bose*.

The court of appeals held below that AETN's debate was a limited public forum. (App. 14a) In this First Amendment case involving "constitutional facts," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984), the court was required to make "an independent examination of the *whole* record." *Id.* at 499 (citations and internal quotations omitted, emphasis added). The court below erred in that analysis. The court rather reached its conclusion by omitting any analysis of most of the evidence about the selection process used by AETN and of the AETC policy framework in which those journalistic selections were made — all "constitutional facts."

Instead, the court of appeals declared that AETN staged the debate "in order for the candidates to express their views on campaign issues" (App. 15a), and that

> [t]he debate was surely a place opened by the government for a limited class of speakers. What was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? . . . . Surely government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation.

Id. In effect, the court of appeals created a nonrebuttable presumption that any candidate who qualifies for the ballot must be invited, regardless of newsworthiness.

The court of appeals set up a false choice by asking whether the "limited class of speakers" consists of all legally qualified candidates or just the Republican and Democratic candidates. The answer is, "neither." Instead, the overwhelming, uncontradicted evidence is that AETN invited to the debates those candidates whom its professional staff judged in good faith to be newsworthy. That was the test. The decision was not based on party affiliation. (J.A. 139)

It is noteworthy that, in the decision below, the court of appeals made no mention of Ms. Howarth's and Ms. Oliver's testimony about their intent to invite only newsworthy candidates. Similarly, the court of appeals completely omitted discussing the significance of the debate's "bona fide news event" exemption from the FCC's equal opportunity rules. (*See* App. 103a) As shown above, an exempt debate sponsored by a broadcaster by definition cannot be a public forum, because the FCC's rules *require* the licensee to exercise editorial judgments, including the selection of the participants. Thus, the court of appeals ignored crucial evidence showing AETN's

intent to select the participants rather than to open the debate to all comers.

That is not the only salient evidence not mentioned by the court of appeals. For example, the court hypothesized that "[t]he debate was surely a place opened by the government for a limited class of speakers." (App. 15a) Yet the uncontradicted testimony of Ms. Howarth was that "the debates were designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for *their* benefit." (J.A. 117 (emphasis added)) The same is apparent from Ms. Oliver's testimony: "I didn't think it would be of *service to our viewers* to include Mr. Forbes on the debate." (J.A. 143 (emphasis added)) The distinction is important, for it shows that AETN did not, under *Cornelius*, intend to benefit any class of *candidates*. It is important too under the FCC's political broadcasting rules, because a debate would lose its exemption from equal opportunities under Section 315(a)(4) if it were held to advance any candidacy, rather than to serve the audience by covering the news in the licensee's bona fide judgment. *Political Primer 1984*, 100 F.C.C.2d at 1502-03.

The court of appeals' error is rooted in its redefinition of the conclusion reached by AETN's professional staff. AETN's journalists concluded that Mr. Forbes was not sufficiently newsworthy. (J.A. 118, 120, 142, 143-44) The court, however, focused in isolation on the fact that AETN considered Mr. Forbes unlikely to win the election (App. 16a-17a), and declared that estimates of "political viability" should be left "to the professional judgment of nongovernmental journalists." (App. 17a) Although Mr. Forbes' admittedly remote chances of winning were one factor, in fact AETN's staff considered far more, including (i) the public's lack of interest in his campaign, (ii) the lack of coverage by other journalists and media

organizations, (iii) his lack of any perceptible campaign organization, (iv) his weak showings in his many prior campaigns, (v) his failure to raise significant funds, and (vi) his dearth of speaking engagements or rallies. (J.A. 91-92, 96-97, 107, 118-19, 120, 126-28, 141, 142, 143-44)

The reasoning of the court of appeals does not comport with this Court's admonition in *Cornelius* that "selective access, unsupported by evidence of purposeful designation for public use, does not create a public forum." 473 U.S. at 805. AETN's intent in creating the forum, the broadcaster's established duty to control all its programming, the tradition and role of exempt debates in broadcasting, and the statutory and regulatory context in which exempt debates occur all lead directly to the conclusion that this program was not intended to benefit the candidates, was opened only to selected candidates who were newsworthy, and was a nonpublic forum.

C. AETN's Decision Not To Invite Mr. Forbes Was Reasonable and Was Not Based on His Viewpoint.

For a nonpublic forum like this one, the state may restrict access as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. This Court explained:

> The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated.

Cornelius, 473 U.S. at 808 (emphasis in original). Given the public's lack of interest in Mr. Forbes, AETN's not inviting him was reasonable. (AETN's judgments in this instance also were narrowly tailored to serve a compelling interest, although the state's exclusion of a speaker from a *nonpublic* forum need not be so tailored. *Id.* at 800.)

The viewpoint prong of the test was resolved by the jury. Last Term, the Court expressed concern about discrimination based on viewpoint. *Rosenberger*, 115 S. Ct. at 2516-19. But this is not such a case. The jury found that AETN did not "exclude[] Mr. Forbes from the political debate because of objections or opposition to his views." (App. 23a) That finding is amply supported by the record. The policies and practices followed by AETN — the *Programming Policy Statement* (App. 96a) and the *Principles of Editorial Integrity* (App. 64a) — are viewpoint-neutral on their face. And there is overwhelming evidence that the decision not to invite Mr. Forbes was based on a judgment that he was not newsworthy, rather than on any evaluation, or dislike, of his viewpoint. (J.A. 125, 139, 141-42, 154)

The decision not to invite Mr. Forbes was also reasonable. AETN's *Programming Policy Statement* requires attention to maintaining editorial integrity. (App. 98a-99a) Ms. Howarth had ample data from which to conclude that her audience in the Third District had essentially no interest in hearing Mr. Forbes state his views. (J.A. 117-21) Moreover, she judged that any attempt by AETN to enhance Mr. Forbes' legitimacy (by putting him on the same program with candidates whose public support was tangible) would be perceived as a breach of trust by the audience. (J.A. 123) *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . .").

Further, the "First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message." *Cornelius*, 473 U.S. at 809. "Rarely will a nonpublic forum provide the only means of contact with a particular audience." *Id.* The "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. Moreover, Mr. Forbes had an alternate channel to be heard — a legally qualified federal candidate may request, and the broadcaster must grant, program time under "reasonable access" requirements. 47 U.S.C. § 312(a)(7) (App. 59a-60a). Mr. Forbes did not take advantage of that opportunity, but asked only to participate in this debate. If he had requested reasonable access, AETN would have granted it.[7/] (J.A. 120-23) Had he simply wanted to broadcast his views, "reasonable access" afforded the vehicle. Mr. Forbes' disinterest in appearing free, but by himself, under "reasonable access," shows that his goal was to gain legitimacy from being seen on the same stage with candidates who had already gained significant public support. He wanted not to level the playing field, but to tilt it to his advantage.

In sum, AETN's decision to exclude Mr. Forbes was reasonable, was not viewpoint-based, and did not preclude him from using alternative channels available to him.

7/ *See Political Primer 1984*, 100 F.C.C.2d at 1479, 1523; 47 C.F.R. § 73.1944 (App. 63a). On a noncommercial network such as AETN, no charge can be made for time granted under reasonable access, and facilities may be charged at cost. 47 C.F.R. § 73.621(a), (c), (e).

II. EVEN IF THE DEBATE WERE A LIMITED PUBLIC FORUM, AETN'S JOURNALISTIC DECISIONS WERE NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST.

The court below found that the debate was a limited public forum. (App. 14a) That decision was erroneous, for the reasons set forth above and in Section III, below. However, even if the First Amendment did not protect Ms. Howarth's exercise of editorial judgment, and even if the debate were held to be a limited public forum, the court of appeals erred when it found that AETN's actions did not meet the criteria applicable to a limited public forum — that the exclusion must be narrowly tailored to serve a compelling state interest. *Perry Educ. Ass'n*, 460 U.S. at 45-46.

Arkansas' interest here is compelling. The Arkansas legislature created AETC "for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas." (ARK. CODE ANN. § 6-3-105 (App. 50a)) The state has a compelling interest to provide the special educational, cultural and informational programming on public television that is not otherwise available to the public. That compelling interest includes airing programming judged by the professional staff to be newsworthy. *See Marcus v. Iowa Pub. Television*, 24 Med. L. Rptr. 2531, 2533 (S.D. Iowa 1996);[8] 97 F.3d at 1143-44. To accomplish that goal, AETN's

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8/ The District Court declared:

> It is profoundly important that the defendant network and it news editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves. So defendants proved they were serving a compelling state interest in excluding the plaintiff candidates from the *Iowa Press* programs.

24 Med. L. Rptr. at 2533 (citations omitted).

editors must be permitted to function as journalists. *See League of Women Voters*, 468 U.S. at 378 ("[W]e must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters.") As this Court has said, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material." *CBS v. DNC*, 412 U.S. at 124. The *Principles of Editorial Integrity* echoes the importance of the editorial function: "Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." (App. 69a) Thus, other than in the decision below, the courts of appeals have repeatedly held that a state public broadcaster has a compelling interest to allow its employees to exercise editorial judgment.[9]

Arkansas has a second compelling state interest — to operate the Network in conformity with the FCC's licensing requirements. The FCC demands that a licensee maintain

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9/ *See Marcus*, 97 F.3d at 1144; *Muir*, 688 F.2d at 1044; *Schneider*, 875 F.2d at 1541.

control over all of its programming.[10/] The access Mr. Forbes seeks would cause Arkansas to give up that control, placing its qualifications as a licensee in jeopardy.

AETN's selection of candidates for the debate was narrowly tailored to meet those compelling state interests. This Court explains that the state may confine a limited public forum "to the limited and legitimate purposes for which it was created," including "reserving it for certain groups or for the discussion of certain topics." *Rosenberger*, 115 S. Ct. at 2516-17. The "constitutional right of access would in any event extend only to other entities of similar character." *Perry Educ. Ass'n*, 460 U.S. at 48. Those are the types of restrictions imposed here. AETN confined the debate to the purpose for which it was created — to carry candidates who, in the professional judgment of AETN's staff, were newsworthy to the viewing audience. Further, Ms. Howarth and her staff made their decision based solely on their informed, good faith editorial judgment. Their decision was not influenced by political pressure, by Mr. Forbes' viewpoint, or by any desire to promote the other candidates. (App. 22a-23a; J.A. 151-52) In short, their decision was narrowly tailored to the state's legitimate, compelling interest to provide valuable programming based on the editorial judgments of its employees.

10/ *See supra* pp. 22-23.

III. THE FIRST AMENDMENT PROTECTS AETN'S EDITORIAL PROCESS.

AETN's broadcast of the debate without Mr. Forbes meets the First Amendment's standards on grounds that are an alternative to forum doctrine: that the State of Arkansas and AETC established AETN as an institution of the free press, so that AETN's editorial decisions are protected under the First Amendment.[11/]

A. AETN's Journalistic Decision-Making Is Separated from the Political and Administrative Influences of the State.

The statute establishing AETC, and authorizing it to create and operate AETN, reflects a compelling governmental purpose. It is to bring the benefits of what is today known as public television to the residents of Arkansas. ARK. CODE ANN. § 6-3-105(a) (App. 50a). This statute is Arkansas' response to what emerged as a national consensus in the 1960s: that the nation would be well served by funding a system of public television and radio so that noncommercial educational programming would become available to almost the entire population of this country. *See generally* JAMES B. CONANT ET AL., THE REPORT OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION, A PROGRAM FOR ACTION (1967) ("CARNEGIE I"); WILLIAM J. MCGILL ET AL., THE LANDMARK REPORT OF THE CARNEGIE COMMISSION

11/ *See* William Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974) (arguing for First Amendment protection of public broadcasters' editorial function), *cited in League of Women Voters*, 468 U.S. at 392 n.21.

ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST (1979). At the time CARNEGIE I was published, there were no public television stations in Arkansas. *Id.* at 107-109.

When the Arkansas legislature set out to establish a public television network in Arkansas, it created what is now AETC, and charged it with the duty of using channels that the FCC had reserved for noncommercial television. ARK. CODE ANN. § 6-3-105(c) (App. 50a). In consequence, AETC as licensee must meet all the requirements to hold a license under the Communications Act.

To that end, AETC adopted the *Programming Policy Statement* (App. 96a) and the *Principles of Editorial Integrity* (App. 64a). The *Principles of Editorial Integrity* explain that they were crafted to deal with problems created under the First Amendment by the issuance of broadcast licenses to governmental entities:

> [I]t was an irony that in a nation where government broadcasting had not only been rejected but was anathema, government was now holding broadcast licenses. And it was to be a source of problems.

(App. 90a)

The *Principles of Editorial Integrity* were developed as a structural solution to the First Amendment conundrum in which AETN, like other state-owned broadcasters, found itself. (App. 90a) AETN adopted the *Principles of Editorial Integrity* to insulate its editorial processes from political pressure. AETC delegated its licensee programming responsibility to its Executive Director, pledging in the *Programming Policy Statement* (which governs all AETN's operations) to protect the Executive Director from political and other undue influence in

the exercise of her programming judgment. The Executive Director became the editor-in-chief of AETN. (J.A. 108) She is responsible for following general policy guidance in making (or delegating and supervising) editorial decisions, and can be dismissed for failure to follow those policies.[12/] However, under the *Programming Policy Statement* and the *Principles of Editorial Integrity*, even AETC's commissioners are not privileged to second-guess her editorial judgments case-by-case.[13/]

12/ However, even if some or all of AETC's commissioners disagree with her news judgment in a particular instance, they cannot dismiss the Executive Director for making editorial judgments that follow the *Programming Policy Statement* and the *Principles of Editorial Integrity*. *See Gladden v. Arkansas Children's Hosp.*, 728 S.W.2d 501, 505 (Ark. 1987) (employer may not discharge employee in violation of express provision in employment manual); *see generally* Canby, *supra* note 11, 52 TEX. L. REV. at 1138-43, 1159-60; *Cf. Bazaar v. Fortune*, 476 F.2d 570, 574-75 (5th Cir.) (under First Amendment, state university could not censor student literary magazine), *aff'd as modified en banc*, 489 F.2d 225 (1973), *cert. denied*, 416 U.S. 995 (1974); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (state college could not, by withholding funds or otherwise, control editorial content of campus newspaper) ("[T]he creation of the form does not give birth also to the power to mold its substance.").

13/ Other states take different approaches to reach the same result of insulating the professional staff's editorial decisions from the state. In Iowa, for example, the legislature established Iowa Public Television as an institution of the press, independent of state political or administrative control. IOWA CODE §§ 256.80, 256.90 (West 1997). Further, the Iowa statute

The protections established by AETC were effective. The jury found that AETN's decision to exclude Mr. Forbes from the debate was not subject to any political pressure (App. 22a), and the evidence amply supports that finding. Mr. Forbes admitted that he knew of no political pressure or other irregularity in AETN's editorial process. (J.A. 102-03) Both Ms. Howarth and Ms. Oliver testified that they received no political pressure about their decision not to invite Mr. Forbes. (J.A. 124-25, 147)

B. Under This Court's Decisions, AETN's Judgments about Newsworthiness Are Shielded by the First Amendment from Second-Guessing by Members of the Public.

This Court recognizes that "broadcasters are engaged in a vital and independent form of communicative activity." *League of Women Voters*, 468 U.S. at 378. For that reason, "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].'" *CBS v. FCC*, 453 U.S. at 395 (quoting *CBS v. DNC*, 412 U.S. at 110). Further, "if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon

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creates an Advisory Committee on Journalistic and Editorial Integrity, and specifically states that IPTV is to be governed by the *Principles of Editorial Integrity*. *See Marcus*, 24 Med. L. Rptr. at 2533, 97 F.3d at 1142.

Oklahoma makes it a misdemeanor for any elected official or his representative to influence the content of any public television program. *Principles of Editorial Integrity* (App. 93a); OKLA. STAT. ANN. tit. 70 § 23-102 (West 1996).

the editorial initiative and judgment of the broadcasters who bear the public trust." *League of Women Voters*, 468 U.S. at 378. That reasoning applies to commercial and public broadcasters alike. *See Community-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (*en banc*) ("noncommercial licensees are fully protected by the First Amendment").

It should not matter that AETN — like most public broadcasters — is owned by the state. AETN's mission is to provide programming that serves the public interest the Court enunciated in *CBS v. FCC* and *League of Women Voters* to provide balanced and diverse programming. (*Programming Policy Statement*, App. 97a-99a). The structural protections for AETC are a state-level complement to "the elaborate structure established by the Public Broadcasting Act [that] already operates to insulate local stations from governmental interference." *League of Women Voters*, 468 U.S. at 388-89. This legislative scheme, plus "the character of public broadcasting," were fundamental to the Court's conclusion in that case that public broadcasting was protected from "governmental coercion and interference" at the federal level. *Id.* at 388, 389. The same is true here at the state level.

The Court also recognized in *League of Women Voters* that at least two-thirds of public television stations were licensed to state entities; but the Court refrained from deciding whether a content prohibition directed only at publicly-owned licensees would violate the First Amendment. *Id.* at 394 nn. 22, 24. This case now raises the closely related issue of whether a state, by adopting and following the *Programming Policy Statement* and the *Principles of Editorial Integrity*, can establish a public broadcasting network as an institution of the press. If so, then Ms. Howarth's editorial decisions are as entitled to the protections of the First Amendment as are the decisions of the

private broadcast press. Those protections are broader than the rules applicable to a nonpublic forum.

When a state employee's professional and ethical obligations "require [her] to act in a role independent of and in opposition to the State," she is not deemed a state actor for constitutional purposes. *West v. Atkins*, 487 U.S. 42, 50 (1988). Therefore, the consequence of AETC's policies and practices is that Ms. Howarth, as AETN's editor-in-chief (J.A. 108), fills the classic fourth-estate role of the press as independent from, and an *adversary* to, the state.[14/] Her *editorial* decisions are, in essential nature, a private press function. Her role as editor is comparable to that of the public defender in *Polk County v. Dodson*, 454 U.S. 312 (1981), who was held not to be acting "under color of state law in exercising her independent professional judgment in a criminal proceeding." *Id.* at 324. "It is the independence from governmental control as to how the assigned task is to be performed that is crucial." *Id.* at 327

14/ The role of the press as adversary to the state has a long legal history in this country, dating at least from the trial of Peter Zenger and including the Sedition Act of 1798, 1 Stat. 596. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 273-77 (1964); *id.* at 270, ("[D]ebate on public issues should be uninhibited, robust, and wide open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("[T]he Government's power to censor the press was abolished [by the Founding Fathers] so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."); *see also, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

(Burger, C.J., concurring). *Compare West v. Atkins* (private physician under contract part-time to state prison hospital system to provide medical care to inmates is in cooperative relationship to state in performing that function, and so operates under color of state law). To determine whether an employee's actions "can fairly be attributed to the State," the Court looks to the employee's "function within the state system, not the precise terms of [her] employment." 487 U.S. at 55. (Like the public defender who may act under color of state law when performing administrative functions, *Polk County*, 454 U.S. at 325, Ms. Howarth's *non-editorial* administrative acts at AETN are performed under color of state law.)

The Court also recognizes that some state-owned property used for expressive activities serves such a special purpose that it is entitled to First Amendment protection. A state-owned university is devoted to the expression of ideas, and its ability to accomplish that mission would be undermined if the teachers employed by the state, speaking on state-owned property, were compelled to give access to members of the public with differing viewpoints.[15/] The Court recognized the special nature of a university in *Widmar v. Vincent*, 454 U.S. 263, 276 (Powell, J.), 279 n.2 (1981) (Stevens, J., concurring); *see also Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Barenblatt v. United States*, 360 U.S. 109 (1959); *Wieman v. Updegraff*, 344 U.S. 183, 194-98 (1952) (Frankfurther, J., concurring). Public broadcasting

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15/ Although the guarantees of free speech apply to school property, "this is not to say that the First Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs." *Perry Educ. Ass'n*, 460 U.S. at 44.

serves a comparable societal function. Just as a state university must "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study," *Widmar*, 454 U.S. at 276 (quoting *Sweezy*, 354 U.S. at 263), so must a public broadcaster, established *and treated* by the state as an institution of the press, determine for itself the programming it will air.

This conclusion affirms that the role of the press cannot be fulfilled if it is without the protections of the First Amendment. Public broadcasters like AETN (or Iowa Public Television in *Marcus*) cannot afford to litigate the basis of their journalistic judgments whenever candidates or interest groups are displeased enough to file a lawsuit. If a state-entity public broadcaster can be haled into court to prove that any one of its editorial decisions is narrowly tailored to meet a compelling governmental interest, the burden in time and cost will be crushing. State-entity public broadcasters cannot carry out their mission under such a regime.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit in *Forbes II* should be reversed, and the case remanded with instructions to enter judgment for defendants.

Respectfully submitted,

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Supreme Court Of The United States

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

v.

RALPH FORBES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. When the government sponsors a debate for political candidates, does it create a limited public forum?

2. May the government discriminate against balloted candidates, banning them from its debate, on the basis of party affiliation or the popularity of the candidates' views?

3. May the government directly influence the outcome of an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special benefits on the candidates of its choice?

LIST OF PARTIES

In the Court of Appeals, the ffollowing were parties:

Appellant: Ralph P. Forbes

Appellees:

Arkansas Educational Televisiion Commission
Arkansas Educational Televisiion Network Foundation*
Dr. Caroline Whitson
Victor Fleming
Diane Blair
James Ross
Jerry McIntosh
Lillian Springer
Lavenia Craig
Robert Doubleday
Susan J. Howarth
Amy L. Oliver Barnes

* The Arkansas Educationall Television Network Foundation has no parent or nonwhollly owned subsidiaries.

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NATURE OF THE CASE

Government Petitioner Arkansas Educational Television Network ("AETN") is an agency of the State of Arkansas that owns and operates a network of five public television stations. In sponsoring a debate for the Arkansas Third Congressional District, AETN invited only the Republican and Democrat candidates and excluded Respondent Ralph Forbes, the only other state-qualified and balloted candidate. Forbes' requests to participate in the debate were denied, and the government aired its debate without him.

The instant case raises questions fundamental to a free and democratic society. May the government directly influence an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special governmental benefits on the particular candidate(s) it has chosen? May the government discriminate by excluding from a public debate balloted candidate speakers on the basis of their party affiliation or the popularity of their views?

The Eighth Circuit's opinion below was a narrow holding. AETN did not have to hold a public debate, but once it did, it created a limited public forum and had to include Forbes, the only other legally balloted candidate. While AETN retained full editorial discretion over its other programming and the format and details of the debate, under the First Amendment it could not exclude balloted candidates. AETN and *amici* now ask this Court for a broad holding contrary to First Amendment jurisprudence: that government-owned and -operated stations are free from the First Amendment constraint.

PROCEEDINGS BELOW

Petitioner AETN decided to sponsor a debate for the 1992 Third Congressional District race in Arkansas and to exclude balloted candidate Ralph Forbes. On October 19, 1992, three days before the debate, Forbes brought suit against

Arkansas Educational Television Commission ("AETC") and AETN and their agents in the United States District Court for the Western District of Arkansas for violations of his rights under the First Amendment as well as of the voters' rights. (J.A. 14)[1]

The District Court denied Forbes' request on October 20, 1992. On October 21, 1992, Chief Judge Arnold of the Eighth Circuit, sitting as a single circuit judge, denied Forbes' request for injunctive relief pending appeal. On October 22, 1992, an Eighth Circuit panel declined to overrule that decision. The debate was held with all the qualified and balloted candidates except Forbes on October 22, 1992.

On December 16, 1992, the District Court granted Defendant AETN's motion to dismiss Forbes' constitutional claims. Forbes appealed. On April 28, 1994, the *en banc* Eighth Circuit, Chief Judge Arnold writing, reversed the dismissal of Forbes' claims. *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423 (8th Cir.) (*en banc*), *cert. denied*, 513 U.S. 995 (1994) ("*Forbes I*"). The court held under the facts

> that Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny.

Id. at 1428. Otherwise, the court noted, state-owned stations would be allowed "to exclude all Republicans, or all Methodists, or all candidates with a certain point of view." *Id.*

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[1] "App." refers to the appendix to the Petition for Certiorari; "D. Ex." refers to defendant's trial exhibits; "J.A." refers to the Joint Appendix; "Pet. Brief" refers to the Petitioner's Brief; "Tr." refers to the transcript of the trial held June 5-7, 1995; "Pl. Exh." refers to plaintiff's trial exhibits.

Trial was held on Forbes' constitutional claims on June 5-7, 1995. The court considered the debate a non-public forum. The district court instructed the jury to answer only whether AETN's decision to exclude Forbes was the result of political pressure from government officials or because of AETN's opposition to his views. (App. 22a-23a) The jury answered the two questions, "No." The district court entered judgment in favor of AETN. (App. 21a)

Forbes appealed, and on August 21, 1996, a unanimous panel of the Eighth Circuit Court of Appeals reversed. *Forbes v. Arkansas Educ. Television Comm'r*, 93 F.3d 497 (8th Cir. 1996) ("Forbes II"). Chief Judge Arnold and the panel held that the debate was clearly a limited public forum. *Id.* at 504. Forbes was within both the class of speakers (candidates for the Third District) and the subject matter of the debate (who should be elected). *Id.*; *see also Forbes I*, 22 F.3d at 1429. The court said the "government cannot, simply by its own *ipse dixit*, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation." *Forbes II*, 93 F.3d at 504. The court held that AETN's reason for excluding Forbes was its perception that he was not "viable," a reason it found legally insufficient. *Id.* The court noted that AETN journalists were "employees of government" and that the "viability" of Forbes was a

> judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communications.

Id. at 504-05. AETN's exclusion of the third and only other qualified and balloted candidate was thus held unconstitutional. *Id.* at 505.

This Court granted Petitidon for Writ of Certiorari on March 17, 1997.

STATEMENT OFF THE FACTS

On October 22, 1992, AAETN staged a congressional debate for Arkansas' Third Congreessional District of the United States House of Representatives. In a three-person race for the Congressional Seat, Respondent Ralph Forbes was the only qualified and balloted candidate exxcluded from the government-sponsored debate. The governnment automatically included Democrats and Republicans onn the basis of their party affiliation. (Tr. 260-61, 266, 270-771 (S. Howarth), J.A. 133-35, 137-38; Tr. 293 (A. Oliver), J.A. 1140; Pl. Exh. 21, J.A. 175-76, Tr. 260, 264) AETN excluded Fcorbes because, in its opinion, he was not a viable candidate and tthus the viewers would not be interested in hearing from him. (FPet. Brief at 16; Tr. 198-200, 212, 258, 269-70 (S. Howarth), J.AA. 117-19, 126, 133, 136-38; Tr. 299, 304, 341 (A. Oliver), JJ.A. 144, 147, 153) In the election cycle in 1990, however, jjust two years earlier, Forbes had received 46 percent of the vote in a *statewide* three-candidate race for the Lieutenant GGovernor Republican Primary. (Tr. 318-21, 343 (A. Oliver) J.A. . 149-51, 153-54; Pl. Exh. 3, J.A. 169, 171, Tr. 113, 115) In thatt race, Forbes won a majority vote in 15 of the 16 countities comprising the Third Congressional District seat for whiich he was running in 1992. (Tr. 318-21 (A. Oliver), J.A. 149-551; Pl. Exh. 3, J.A. 169, 171, Tr. 113, 115) AETN's descriptionn of Forbes in its Questions Presented and Brief as a candidaate in whom the public has shown "*no interest*" is not accuratee. (Pet. Brief at i, 15)

1. Petitioner AAETC and AETN

Petitioner is the governmentt. AETC is an agency of the State of Arkansas. ARK. CODE AANN. § 6-3-101 (App. 47a) AETC and its commissioners operrate AETN. (Tr. 183-84 (S. Howarth), J.A. 107-08) The eight ccommissioners are appointed

by the Governor of Arkansas. § 6-3-102(b)(1), (App. 48a) Appointments by the Governor require the advice and consent of the Arkansas Senate. § 6-3-102(b)(1)-(4) (App. 48a) The commissioners in turn appoint the Executive Director of AETC and AETN, who currently is Susan Howarth. (Tr. 183-84 (S. Howarth), J.A. 108) Public appropriations fund the state agency and network. § 6-3-113 (App. 54a-55a) All employees are supervised only by other State employees paid from State funds. § 6-3-110(d) (App. 53a) AETN's organizational chart, admitted at trial, clearly sets forth its purely governmental character. (D. Ex. 3, J.A. 179, Tr. 180, 183) AETN is a state-created, -owned and -operated media chain that blankets the State of Arkansas and its voters.

2. The Debate

In 1992, AETN decided to sponsor and hold Congressional Candidate Debates, including one for the Third Congressional District of Arkansas. Each debate was to last one hour. (Tr. 200 (S. Howarth), J.A. 119) When the instant debate was set up, AETN invited all the candidates balloted at that time. (Pet. Brief at 14) Two months later, Forbes qualified and entered the race. *Id.*

Forbes qualified under state law as a balloted candidate by obtaining thousands of signatures from registered voters in the district in which he was seeking office. ARK. CODE ANN. § 7-7-103(c)(1), (3); (Tr. 107-09 (K. Forbes) (testifying he obtained 6,000 signatures)) In doing so, Forbes signed up and prompted the registration of a number of young voters who had been disenchanted and had not planned to register or vote before meeting him. (Tr. 132-33, 135-36 (R. Forbes); Pl. Exh. 16, Tr. 135, 136) Soon thereafter, on August 24, 1992, and two months before the scheduled debate, Forbes requested by letter to be included in the government-sponsored debate as the only other certified, qualified candidate. (D. Ex. 11, Tr. 179, 197, App. 105a)

AETN believed it could, like a commercial station, exclude Forbes for any reason it wished, even for his viewpoints. (Tr. 206, 211, 238 (S. Howarth), J.A. 123, 125-26, 129-30) Howarth, the Executive Director and decision-maker, stated, "It was our understanding, my understanding . . . we could invite anyone to participate in the debate for whatever reason. It was our judgment, our editorial decision to make." (Tr. 238 (S. Howarth), J.A. 130) She decided to exclude Forbes. AETN decided to "stick with the major candidates" because it had heard stories about balloted candidates in other states who had no party endorsement. (Tr. 293 (A. Oliver), J.A. 140) Howarth notified Forbes he could not participate in the government's debate. (D. Ex. 12, Tr. 179, 205, App. 103a)

AETN developed and published an advertisement to promote the debate to voters and the public. The promotion asked the public, "Do you know *your candidates?*" and encouraged them to get better acquainted with "*the candidates,*" naming and picturing only the Republican and Democratic candidates and excluding Forbes. (Pl. Exh. 13, J.A. 174, Tr. 131-32, 267 (emphasis added)) Howarth defended the AETN statements despite the government's implicit message to the public that there were no other qualified candidates in the Third District. (Tr. 267-69 (S. Howarth), J.A. 135-37)

On the day of the debate, Forbes traveled to the AETN's studio to request inclusion and was confronted by Oscar Eugene Goss of AETN. Goss not only denied Forbes' request but also instructed the number of reporters who had assembled not to give Forbes any publicity. (Tr. 127-29, J.A. 85-87) The debate took place without Forbes. The winner of the race won by a margin of less than three percent. (D. Ex. 22, Tr. 179, 302, J.A. 172)

3. The Trial

At trial, AETN argued it had excluded Forbes because,

in Howarth's judgment, he was not a viable candidate and thus the viewers would not be interested in hearing from him. (Tr. 198-200, 212, 258, 269-70 (S. Howarth), J.A. 117-19, 126, 133, 136-38; Tr. 299, 304, 341, (A. Oliver), J.A. 144, 147, 153; Pet. Brief at 16) Despite AETN's extensive reliance in its brief to this Court on "newsworthiness" as its standard for exclusion, that term was never used by any of its witnesses as their basis.[2] Specifically, Howarth testified her basis was her judgment of whether Forbes had a "serious" or "reasonable chance to win." (Tr. 198-200, 212, 258, 269-70, J.A. 117-19, 126, 133, 137-38). More specifically, AETN's answer filed in the instant suit states Forbes was excluded because, in the judgment of AETN, "plaintiff [Forbes] was *not perceived* as a *viable candidate* . . . ." (D. Answer, filed July 11, 1994, ¶11 (J.A. 57) (emphasis added))

AETN proffered that it based its perception on factors such as the money Forbes raised, his campaign headquarters, popular support, media interest, and post-election results. Such criteria, however, were not applied to other candidates in any of the congressional debates. For example, in one of the other congressional debates, AETN invited an "unknown" candidate to participate despite his raising much less money than what AETN required of Forbes. (Pl. Exh. 21, Tr. 260, 264, J.A. 175; Tr. 260-61 (S. Howarth), J.A. 133-34) When questioned about this invitation, AETN's own witness, Howarth, conceded it was given because he was the Republican candidate, a factor that apparently trumped all other criteria applied to Forbes. (Tr. 260-61, 266, 269, J.A. 133-37) AETN considered Republicans

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[2] In its brief, AETN spends much time describing Forbes' private reminiscences of his campaign at the trial which took place a full three years after the exclusion. Such statements were, of course, not a basis for AETN's decision, and thus completely irrelevant. AETN and its employees, in fact, never interviewed or attempted to reach Forbes before excluding him. (Tr. 313 (A. Oliver), J.A. 148)

and Democrats viable regardless of their actual popular or media support. (Tr. 269, 271, J.A. 136-38) Support was assumed and inclusion in the debate thus automatic. It would not be surprising, therefore, that AETN would invite a Republican to its debate although the seat had never been won by a Republican in the history of the State of Arkansas. (Tr. 270, J.A. 137-38)

AETN treated Forbes differently, relying heavily on its conclusion that he did not have "popular" support, had low media interest, and would not be of interest to the viewers. (Tr. 201-02, 269, 271 (S. Howarth), J.A. 119-20, 136, 138; Tr. 293, 296, 298 (A. Oliver), J.A. 140, 142-44) Forbes' past election results, however, reveal clear public support and interest. In 1986, Forbes ran in a statewide race for the Arkansas Lieutenant Governor Republican Primary. He received 46.98 percent of the statewide vote. (Tr. 33 (A. Oliver), J.A. 153; Pl. Exh. 3, Tr. 113, 115, J.A. 169-70) In 1990, just two years before the 1992 AETN debate in question, Forbes ran again for Lieutenant Governor. In a three-candidate race for the Lieutenant Governor Republican Primary, he received 46.88 percent statewide. (Tr. 318-21 (A. Oliver), J.A. 149-51; Pl. Exh. 3, Tr. 113, 115, J.A. 169, 171) While he failed to win the runoff, his impressive showing in the statewide primary was particularly relevant to the 1992 race. Not only did he carry 46.88 percent statewide in a three-person race, but he also won a majority vote in 15 of the 16 counties comprising the congressional seat for which he was running in 1992.[3] *Id.*

Additionally, in checking for media and public interest, AETN never called Forbes and never called the two dominant television stations in the Third Congressional District. (Tr. 313 (A. Oliver), J.A. 148; Tr. 374-75 (C. Cannon), J.A. 158; Tr. 392-93 (B. Edson), J.A. 161-62; Pl. Exh. 25, Tr. 389, 390, J.A.

[3] It should be noted that in the last two Presidential elections the winning candidate won with less than 50 percent of the vote.

177; Pl. Exh. 26, Tr. 390, 391, J.A. 178) News Director Burnham Edson of KFSM-TV, in fact, stated Forbes had been on his station twice during the campaign and that there was good viewer response and interest. (Tr. 387-88, J.A. 160-61) News Director Craig Cannon of KHVS-TV stated his station also gave coverage to Forbes' candidacy, stressing the station's duty to enable the public to hear what "legitimate candidates" like Forbes had to say. (Tr. 380-82, J.A. 158-59) Cannon implied, in his journalistic opinion, Forbes should have been included in the debate.[4] (Tr. 377)

In determining the interests of its viewers, AETN apparently followed the advice of its own witness, who conceded, "there are no rules in journalism." (Tr. 306-07, J.A. 148)

SUMMARY OF THE ARGUMENT

AETN intentionally sponsored and convened a political debate, opening its property for public discourse by outsiders on the specific subject of the race for the Third Congressional District seat. It opened a limited public forum. Having done so, AETN may not exclude a speaker similarly situated in subject matter or the class of speakers without a compelling justification. Forbes, the only other balloted candidate in the race, was both in the class of speakers (candidates) and subject matter (who should win the race) of the forum. Arguments that a televised political debate is not a forum for public discourse

[4] Regarding AETN's argument that including Forbes in the debate would take away its air time, which is precious, it should be noted that some of that important air time included running reruns of "St. Elsewhere." (Tr. 127-28 (R. Forbes), J.A. 85-86,Tr. 353 (O. Goss)) Forbes testified he was told by Goss that if Forbes was allowed into the debate, AETN would run "St. Elsewhere" reruns instead of broadcasting the debate. *Id.* Goss later said it was a "[v]ery poor choice of words" and a misunderstanding, but conceded St. Elsewhere reruns were usually run for the same prime time of night as the debate. (Tr. 352-53 (O. Goss))

are untenable.

AETN asserts no compelling governmental interest in excluding Forbes. While it asserts a broad interest in complying with FCC regulations, it never contends the FCC required it to exclude Forbes from the debate. The FCC, of course, did not require any such action. Additionally, while AETN asserts a broad interest in providing educational television and maintaining journalistic discretion, it never asserts the exclusion of Forbes is necessary to meet such a broad interest. In fact, AETN retains its editorial discretion to schedule or not to schedule and to set the rules for conducting the debate, the time of the debate, whether it will be live, whether there will be audience, who will moderate, and any other editorial exercise. It simply may not discriminate against a balloted candidate. The legitimate government interests -- assuring public access to a diversity of information sources and respecting the right of the people of Arkansas to choose their own standards for candidate seriousness -- actually support Forbes' inclusion.

Even if political debates were to become non-public forums, AETN's actions are still in violation of the First Amendment as viewpoint discriminatory and unreasonable. AETN's very purpose in excluding Forbes was to provide more time and a platform to major-party candidates and their views and to exclude minor-party candidates and their views. Additionally, using party affiliation as a criterion, AETN discriminated on the basis of sets of political viewpoints and their acceptance to the public. Using popularity as a criterion for exclusion, AETN engaged in viewpoint discrimination on the basis of the alleged unpopularity of Forbes' views. This determination was also unreasonable in light of Forbes' recent election results.

Alternatively, even if forum analysis did not exist, AETN's actions violate the First and Fourteenth Amendments. Simply put, the government does not have the power to directly

influence an election by subjectively looking at individual candidates, determining their worthiness, and then conferring special benefits on the particular candidate or candidates it chooses. Free societies require free and fair elections. The crucial nature of the political speech involved in this case, the rights of voters, the rights of listeners, and the possible effect on the electoral process all mandate AETN's subjective interference in an election be struck down. Government infringements in such a sensitive area of freedom must meet objective, narrow, and definite standards. The people of Arkansas had already provided such an objective standard for candidate seriousness through years of legislative and judicial effort: its ballot access law. AETN simply ignored it.

ARGUMENT

I. AETN'S EXCLUSION OF FORBES FROM A LIMITED PUBLIC FORUM WITH NO COMPELLING JUSTIFICATION VIOLATES THE FIRST AMENDMENT.

AETN's exclusion of Forbes from a limited public forum without compelling justification violates the First Amendment. This basis alone is sufficient to support the Eighth Circuit's judgment.

A. Political Speech And Expression Have Been Granted The Fullest Extent Of Protection Under The First Amendment.

The authors of the First Amendment were aware "that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 318 U.S. 141, 143 (1943). First Amendment protection thus does not turn upon the "popularity" of the views or beliefs of the speaker. *New York*

Times Co. v. Sullivan, 376 U.S. 254, 271 (1964). The presupposition, instead, is "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id.* at 270 (quoting Judge Learned Hand, *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y 1943)). Freedom of political expression of a wide range of ideas is necessary for the government to be responsive to the will of the people and for the people to make political change peacefully and not unlawfully. *See New York Times*, 376 U.S. at 269; *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (stating "speech concerning public affairs is more than self-expression; it is the essence of self-government").

Debate by candidates for public office is thus at the very core of First Amendment protection and

> integral to the operation of the system of government established by our Constitution. The First Amendment *affords the broadest* protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley v. Valeo, 424 U.S. 1, 14 (1976) (emphasis added) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

B. AETN's Government-Sponsored And -Planned Debate Was A Limited Public Forum From Which Forbes Was Improperly Excluded.

Three types of forums exist for First Amendment analysis of the exclusion of speakers from government property. The first type of forum is the traditional public forum. The public forum is a place such as a park or street which has "immemorially been held in trust . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*,

460 U.S. 37, 45 (1983). In a traditional public forum, the government may exclude a speaker "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

The second type of forum is the designated or limited public forum. A designated public forum is a government-created place or channel of communication "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* at 802; *see also International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (defining limited forum as "property opened for expressive activity by part or all of the public"). While the government is not required to retain the open character of this forum indefinitely, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 45-46. The government thus must justify any exclusion by showing the necessity to serve a compelling governmental interest and proving that the exclusion is narrowly drawn. *See Cornelius*, 473 U.S. at 800.

By contrast, a non-public forum is property "which is not by tradition or designation a forum for public communication . . . ." *Perry*, 460 U.S. at 46. The government may exclude a speaker from a non-public forum as long as the exclusion is "reasonable in light of the purpose which the forum at issue serves;" *id.* at 49, and is not made to suppress the speaker's viewpoint. *See Cornelius*, 473 U.S. at 800.

Examples of forums this Court has held non-public include letterboxes, *see United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); military bases, *see Greer v. Spock*, 424 U.S. 828 (1976); internal school mailboxes, *see Perry*; a funding drive in the federal workplace, *see Cornelius*; and prisons, *see Adderly v. Florida*, 385 U.S. 39

(1966). Examples of forums this Court has held to be limited open forums include university facilities opened for student groups, *see Widmar v. Vincent*, 454 U.S. 269 (1981); a theatre leased by a city and opened for productions, *see Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975); and a school board meeting limited to school business, *see City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Communications*, 429 U.S. 167 (1976).

The parameters of the forum involved in this case are easily defined by looking at the access Forbes sought. As stated in *Cornelius*, "in defining the forum we have focused on the access sought by the speaker." 473 U.S. at 801. Forbes sought access to the debate alone. He did not seek access to other programming or the station as a whole. AETN's attempt to characterize the forum as the whole station and all its programming is without merit. The Eighth Circuit correctly determined the forum at issue is the government debate alone. *Forbes II*, 93 F.3d at 503. Any other approach would strike down this Court's past limited forum cases. For instance, in *Widmar*, the forum to which the plaintiffs sought access was the student groups' use of university facilities. 454 U.S. at 265. If AETN's approach were allowed, the university could have simply stated the relevant forum was all its facilities, including its classrooms. Under such an approach, no limited forums could survive. Forbes claimed only a right to express his political viewpoints and to advocate for his election on equal terms with his competitors in a distinct and particularized forum. The relevant forum is thus the debate.

1. The Debate Was A Limited Public Forum.

In determining whether the government opened a limited forum, this Court looks to whether the government intended to open its property for public discourse.

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.

Cornelius, 473 U.S. at 802. Forbes does not proffer "inaction" or "permission" of discourse in the instant case. The intent and action of the government could not be more clear. Government AETN conceived, staged, and broadcast the debate in question. Under its own factual recitation, it intentionally opened up governmental property for outsiders to engage in free expression and discourse in the limited context of a congressional debate. It opened a forum. Its position that the debate is a non-public forum is untenable.

AETN argues that the government's exercise of editorial discretion indicates it does not intend to open a forum. It says its decision to exclude Forbes, in fact all its speech decisions, are exercises of editorial discretion. A more broadly sweeping and circular argument can hardly be imagined. AETN is essentially requesting a *per se* rule that the government *never* intends to open a forum for public discourse as long as it exercises editorial discretion within the forum. Intent to maintain editorial discretion is not the test. Instead, intent to open its property for public discourse is the relevant inquiry.

The free exchange of ideas which occurred in AETN's live broadcast, without editorial constraint, constituted public discourse. In its essence, a debate requires a free exchange of ideas without complete government control. AETN was well aware that when it invited the outside candidates, it would not be able to edit, cut and paste, or control the content of the candidates' words as they came from their mouths. Additionally, political candidates' use of an open microphone for opening and closing remarks is public discourse, not editorial control.

If a government-sponsored and -planned debate is not a limited public forum, one can only wonder what is. If a quintessential limited public forum existed, it would be a political debate sponsored by the government. Because the debate was a government-created channel of communication for use by a certain class of speakers, the AETN debate is more akin to those forums found by this Court to be limited forums than to the letterbox, military base, internal school mailboxes, funding drive in the federal workplace, and prisons this Court has found to be non-public forums.

A final indication of whether a public forum exists is whether the nature of the forum in question is "compatib[le] with expressive activity." *Cornelius*, 473 U.S. at 802. AETN in its brief attempts to use this principle to its advantage in arguing Forbes' inclusion would not be compatible with the debate and would cause a disruption. AETN, however, twice misquotes this Court, adding the word "the" in front of "expressive activity" without notation.[5] (Pet. Brief at 21, 28-29) The result changes the question from whether, in this case, a government-sponsored debate is compatible with expressive activity -- in general -- to a question of whether the debate was compatible with Forbes' expressive activity.

Under either this Court's approach or AETN's, the answer is yes. A debate is unquestionably compatible with expressive activity. It is, in fact, created for the purpose of expressive activity. Unlike *Cornelius*, where the charity fund was not created for the purpose of expressive activity but to lessen expression and minimize disruption, the AETN debate was created for the specific purpose of expression. *Id.* at 805.

Additionally, Forbes' expression was directly compatible

[5] Forbes does not mean to imply AETN intentionally misquoted the Court for its advantage. Counsel for AETN has consistently been professional, ethical, and courteous in his dealings with Counsel for Forbes.

with a government-sponsored debate for the congressional seat for which he had qualified and was running. He was, in fact, the only similarly situated candidate who was excluded. He was compatible with both the subject matter being discussed as well as the genre of speakers.[6] *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stating "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"). The debate was a limited public forum, as the Eighth Circuit correctly held.

2. As A Similarly Situated Speaker, Forbes Was Improperly Excluded From AETN's Forum.

AETN also argues that since it selected only certain participants for its debate, the debate was not a public forum. (Pet. Brief at 24) It argues that "selective access" is not enough to establish a public forum. *Cornelius*, 473 U.S. at 805. This argument reveals a misunderstanding of the law.

Cornelius actually says selective access unsupported by a "purposeful designation" is insufficient to open a public forum. *Id.* As stated above, AETN purposefully designated its property for public discourse by outsiders. It planned a political debate for the exchange of ideas by candidates. It opened up its property. It did not select *all* the general public for the discourse. The forum was thus a limited public forum opened for a class of speakers or for the discussion of certain subjects.

[6] AETN argues that Forbes' inclusion would be a disruption because it would reduce the time of the other two qualified candidates. (Pet. Brief at 29) Governmental restriction of the speech of some "in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978). While Forbes' expression was thus compatible with the debate, even if it had not been, AETN's basis for exclusion still would be invalid.

See id. at 802; *Perry*, 460 U.S. at 46 n. 7. AETN's argument would close all limited publicic forums, since all limited forums require selective access, whetther on the basis of subject matter or class of speaker.

AETN's argument thaat the debate was for selected candidates who were "newswworthy" in its eyes is thus also without merit.[7] The argumeent is, essentially, that since the government was attempting to o exclude Forbes, it did not create a forum. AETN thus spends mmuch time in its brief establishing its intent to exclude Forbes. TThis fact Forbes does not dispute. When the debate was planned,d, invitations were sent out to all the qualified candidates at thaat time. (Pet. Brief at 14) Two months later, Forbes qualifiedd. *See id.* AETN then had a decision to make. Its intent toto exclude him does not alter the reality, however, that it createed a limited public forum for the congressional debate.

AETN's use of its inteent to exclude to prove that no forum existed is a circular argument that would, in effect, end the limited public forum as a protection for speech. The government could open a forumm and then carve out any specific individuals it desired to excludle, despite their being in the class of speakers or subject matteer of the forum. The Arkansas debates here were clearly f forums opened to certain speakers (congressional candidatess) for the discussion of certain subjects (who should be electedd). Forbes qualifies under either limiting factor.

As statated in *Perry*, "[w]hen speakers and subjects are similarly situuated, the State may not pick and choose." 460 U.S. at 55. Fcorbes, in fact, was the only one so similarly situated, having g qualified as a balloted candidate under state law. The

[7] Again, while AETN consistently argues in its brief that its forum was specifically only for "newsworthy" candidates, this is a term never used by any of its witnesses at trial as the basis for Forbes' exclusion.

instant case is similar to this Court's decision in *Southeastern*. In *Southeastern*, the city was not originally required to open the municipal facility for theatrical productions. When it did, however, it created a limited public forum. The city could not thus exclude one speaker (theatre group) from the forum because it was "in the best interest of the community." *Southeastern*, 420 U.S. at 549, 552-53. Such a subjective exclusion provided unbridled discretion over speech to a government official and was unconstitutional. *See id.* at 553.

Likewise, AETN did not have to organize the instant congressional debate. Yet, it did. Having done so, it may not exclude a speaker similarly situated without a compelling justification. "Non-viability," or even "newsworthiness," is an insufficient and subjective standard which does not meet First Amendment requirements.

Under AETN's approach, *Southeastern* would have been decided differently. The forum would have been a non-public forum because the city's intent of selective access was to allow clean and healthy plays "in the best interest of the community." *Id.* at 549. The *Widmar* decision would also be changed. The University would be held to have opened only a non-public forum for non-religious groups, despite the religious groups' being otherwise similarly situated. AETN's position is not the law. Like the University in *Widmar*, once the government opens a forum for public discourse, unequal treatment is constitutionally suspect and must meet strict scrutiny.[8] *Id.* at 267, 269-70.

AETN's inference that Forbes could have spoken

[8] AETN's attempt is actually very clever. Instead of carrying its burden in attempting to show "non-viability" or "newsworthiness" is a compelling governmental interest, it tries to redesign the forum, using its alleged compelling governmental interest as a requirement for the creation of the forum.

somewhere outside the debate forum is without merit.[9] Once the government excludes a speaker who would otherwise be included in a designated forum, the government must show "the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800. Exclusion is thus not justified on the basis that the speaker may have exercised his or her rights in some other place or time. *See Southeastern*, 420 U.S. at 556; *Schneider v. State*, 308 U.S. 147, 163 (1939) (holding "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). Additionally, any other alleged alternative for communication would not have provided the unique opportunity for Forbes to challenge his opponents, face to face, in a live contest, to woo potential voters.

Finally, AETN encourages this Court not to find the debate a limited public forum because doing so might lead to a flood of candidates with requests or create a cacophony which would disrupt the debates or other programs. (Pet. Brief at 28) This argument is invalid. First, AETN does not offer these fears as a compelling governmental interest but as a policy reason to encourage this Court not to find a forum existed. The determination of the existence of a forum, however, is to be based on the specific acts and intent of the government, not any inconvenience the government proposes might occur because of its action. *See Cornelius*, 473 U.S. at 802. Second, no potential flood of candidates or basis for any other of AETN's fears

[9] Forbes made numerous requests for equal treatment and time to respond to his opponents. (Tr. 123-24, 140, 163-64, 173 (R. Forbes), J.A. 85, 101-02, 107) AETN, however, refused to inform Forbes of any right to "reasonable access" or any right he had to respond unless he used the "magic words," as his witness testified. (Tr. 351, 355-56 (O. Goss), J.A. 155-57)

existed, nor were any such facts entered into evidence.[10] The facts are clear that the only person excluded from the government debate was Forbes. "Mere speculation of harm" and "undifferentiated fear of . . . disturbance" are not enough to overcome freedom of expression. *Grayned*, 408 U.S. at 117; *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980). Such theoretical harm is thus neither a compelling governmental interest nor narrowly tailored.

Third, presentation of a diversity of viewpoints is favored by and a purpose of our First Amendment. Despite AETN's exaggerated fears of a cacophony resulting from the expression of a diversity of viewpoints, this Nation has decided to promote political diversity as a value in itself. Ironically, AETN's own policy proffers its purpose as being to enhance the public's access "to the full range of ideas and viewpoints" for voters. (App. 100a) This Court rejected a similar argument in the *City of Madison* case, which also centered around a limited public forum. State law prohibited teachers, other than union representatives, to speak at school board meetings if their speech was addressed to pending collective bargaining matters. *City of Madison*, 429 U.S. at 169. The Supreme Court of Wisconsin upheld the law on the basis that the speech infringement was justified to avoid dangers of disruption and chaos in labor management relations. *Id.* at 173. This Court, however, struck the law down, noting it discriminated against categories of speakers. *Id.* at 175-77. AETN's speculative fears, therefore, are unavailing. They argue against the protection of diversity and minority expression and are insufficient as reasons for

[10] In fact, in the last 25 general elections for the U.S. House of Representatives, an average of only 75 independent or minor-party candidates per election have sought a seat in the 435 congressional districts. *See Congressional Quarterly Almanac*, and *Congressional Quarterly Weekly Report*, 1948-96. Therefore, on average, only one out of six congressional districts have even one third-party candidate on a ballot; this is hardly a cacophony or flood of candidates.

exclusion. *Cf. Martin*, 318 U.S. at 143 (holding unconventional speech disturbs, but must be protected); *New York Times*, 376 U.S. at 271 (holding First Amendment presupposes that right conclusions are better reached by multitude of voices).

Contrary to AETN's parade of horribles, the limiting principle to the Eighth Circuit's decision is easily defined. Its decision applies only to candidate debates sponsored and planned by government-owned and -operated stations.[11] Only such debates invite outside, specific, private individuals (candidates) to engage in public discourse on a specific subject matter (campaign issues), knowing the government will not be able to control or edit the words or views of the candidates. In the instant case, the boundary is even tighter as only qualified candidates, those who to have passed the State's threshold test for seriousness, would have access.

What AETN requests is, on the other hand, without

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[11] As Judge Clark explains,

> "[T]he decision to show or not to show a particular program or documentary and the ideas contained therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could, by creating a synergism between the candidates' immediately conflicting positions.

Chandler v. Georgia Pub. Telecomms. Comm'n, 917 F.2d 486, 493 (11th Cir. 1990).

boundaries. If the government debates were not limited forums, then the government could exclude candidates on any basis it wished, except viewpoint. If African-American, religious, or female candidates had a general history of not performing well in a district, the new newsworthy standard would, in fact, encourage their exclusion for lack of public support or viability. Such candidates would have no recourse under First Amendment forum analysis.[12]

C. AETN's Exclusion Of Forbes Is Not Justified By Any Compelling Government Interest.

Having improperly excluded Forbes from a limited public forum, AETN must prove the exclusion was necessary to meet a "compelling" interest and was narrowly drawn to achieve that interest. AETN's proffered compelling interests fail to meet this strict scrutiny.

In its presentation of two alleged compelling interests, AETN attempts subtlely to change the focus of the inquiry to one broader than appropriate. AETN argues it has compelling interests in complying with Federal Communication Commission ("FCC") regulation and in exercising journalistic discretion over all its programming. The proper question, however, is whether AETN had a compelling interest requiring it to exclude Forbes from the debate. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972) (holding the question was whether government had a compelling interest in not providing an exemption to Amish plaintiffs for the one or two years of schooling in question, not whether it had an interest in education as a whole); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 719 (1981) (holding question of compelling interest is properly

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[12] Reduction in protections under limited public forums would have a strong impact on religious speakers and groups who rely heavily on this forum for protection of their religious speech. *See, e.g., Widmar v. Vincent*, 454 U.S. 269 (1981).

narrowed to whether actual harms, not speculated harms unsupported by evidence in the record, were imminent). AETN asserts no compelling interest in excluding Forbes from the debate.

1. AETN Fails To Prove A Compelling Interest Through The FCC.

AETN asserts a compelling interest in conforming with the requirements of the FCC. AETN, however, nowhere asserts that including Forbes would have been non-compliance with the FCC. In fact, AETN's Executive Director specifically stated there was no FCC regulation or criterion saying it could, much less had to, exclude Forbes from the debate. (Tr. 229-30) AETN cites no case or example where a licensee lost its license, or was confronted by the FCC, for including what it considered a "non-viable" or "non-newsworthy" candidate on a television debate. Even if the FCC had required Forbes' exclusion, which it clearly did not, that requirement would still be an insufficient basis to override a First Amendment violation. Complying with a government statute cannot be a basis for overriding a First Amendment right. If it were, the Constitution would be nullified by governmental statutes.

As the FCC itself has recognized, it is bound by the First Amendment. *See In re KMAP, Inc.*, 72 F.C.C.2d 241, 244 (1979). AETN thus cannot use compliance with the FCC to overcome the First Amendment. Also, the FCC has a longstanding policy of deferring to licensee discretion. *See In re Right to Life, Inc. v. WAVE-T.V.*, 59 F.C.C.2d 1103 (1976). Complying with the FCC in this case thus means AETN could do whatever it wishes.

2. AETN Fails To Prove A Compelling Interest Through Educational Programming And Journalistic Discretion.

AETN also asserts a compelling interest in providing educational television, which it says is dependent on journalistic expression. AETN again, however, nowhere explains why the exclusion of Forbes was required to accomplish such a compelling interest. It, of course, was not. The very purpose, in fact, for the creation of the public broadcasting system was to bring greater diversity to programming, often by supplementing commercial broadcasting that might appeal only to limited audiences. *See* JAMES B. CONANT ET AL., THE REPORT OF THE CARNEGIE COMMISSION ON EDUCATIONAL TELEVISION, PUBLIC TELEVISION: A PROGRAM FOR ACTION 13-14 (1967). AETN's own policy states its purpose is to

> further the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens and voters to make informed judgments about the issues of our day.

(D. Ex. 4 §10, Tr. 179, 186 (App. 100a)) Excluding the third and only other set of views from a political debate does not serve such purposes.

Additionally, Forbes has never advocated taking away AETN's journalistic discretion. AETN remains free to schedule or not to schedule debates and to set the rules for conducting the debate, the time of the debate, whether it will be live, whether there will be an audience, who will ask the questions, and any other editorial exercises. It simply may not discriminate against qualified and balloted candidates.

AETN is actually seeking not to be bound by the First Amendment and to exercise discretion at all times without

restriction. In arguing that it should have complete journalistic independence without restriction, AETN cites this Court's opinion in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ("*CBS v. DNC*"), that the "concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as government action." 412 U.S. 94, 121 (1973); (Pet. Brief at 30). Yet, read in context, this statement explicitly contradicts AETN's requested boundless journalistic discretion. In *CBS v. DNC*, *private* entities filed suit against *private* broadcast stations for alleged violations of FCC regulations and the First Amendment. 412 U.S. at 97. In trying to apply the First Amendment to the defendants, plaintiffs argued defendants were state actors. In concluding private broadcasters were not state actors, this Court looked at the "concept of private, independent, broadcast journalism" and stated "[t]hat concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action." *Id.* at 121. Simply put, if the broadcasters are state actors, the First Amendment precludes them from having unfettered journalistic discretion.

The Court could hardly deal with this issue more clearly. If a broadcaster is a state actor, complete journalistic independence "could not co-exist." *Id.* AETN is a state-owned and -operated television network. It is undisputedly a state actor. Unlike a private broadcaster, it thus does not have unfettered independent journalistic independence. Such is the difference between being protected by the Constitution, as a private broadcaster is, and being bound by it, as is AETN.

If any compelling interests exist, they are in fact furthered by including Forbes in the debate. First, the discretion sought by AETN to exclude Forbes is the discretion to override the decision of the people of Arkansas as to who is "politically viable." The people have an interest in preserving the integrity of the political process and have already provided limitations on

candidates to control ballot congestion and frivolous candidacies. *See Williams v. Rhodes*, 393 U.S. 23 (1968); *Lendall v. Bryant*, 387 F. Supp. 397, 402 (E.D. ARK. 1975). In Arkansas, the statutory standards for qualifications are the product of years of legislative and judicial refinement. *See Lendall*, 387 F. Supp. at 402 (invalidating ballot access law for independent candidates requiring fifteen percent of eligible voters); 1975 ARK. ACTS NO. 700 § 1 (reducing required petitions to ten percent); *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. ARK.), aff'd 433 U.S. 901 (1977) (invalidating 10 percent petition requirement); 1977 ARK. ACTS NO. 731, § 1 (reducing required petitions to three percent and extending filing deadline); *Rock v. Bryant*, 459 F. Supp. 64 (E.D. ARK.), aff'd 590 F.2d 340 (8th Cir. 1978) (sustaining qualifications).

Forbes clearly met the pre-established statutory qualifications for candidacy, which were designed "to avoid or at least minimize confusion and frustration at the polls." *Rock*, 459 F. Supp. at 73. He secured signatures from the over 2,000 electors required in Arkansas' Third Congressional District. ARK. CODE ANN. § 7-7-103 (c)(1), (3); (Tr. 107-09 (K. Forbes) (testifying Forbes received 6,000 signatures))

AETN thus seeks discretion to allow one unelected government official to override the standard for viability that has been painstakingly developed through the years by the people of Arkansas. This objective standard set forth ahead of time and by the people is much preferable to the governmental discretion sought by AETN. If a compelling interest exists here, it supports the people's right to choose their own candidates and standards for candidate viability.

Additionally, this court recently held there is a government purpose "of the highest order" in assuring the public has access to a multiplicity of information sources. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663, (1994) ("*Turner I*"). Excluding the third and last set of candidate views from a

political debate is contrary to this important governmental interest. Not only does AETN not have a compelling interest justifying its exclusion, but its actions actually violate important governmental purposes set forth by this Court in interpreting the First Amendment.

3. AETN's Exclusion Is Not Narrowly Drawn.

Finally, AETN's exclusion of Forbes was not narrowly drawn. The criteria it used for exclusion, "non-viability," or even "non-newsworthiness," are subjective criteria and thus not narrowly drawn to effectuate any compelling interest. As the Eighth Circuit noted, AETN has conceded its criteria are ultimately "essentially subjective." *Forbes II*, 93 F.3d at 504. Additionally, this Court has stated that evaluating newsworthiness requires analysis of the substantive message. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). Such subjective criteria are thus not objective and narrow standards tailored to avoid First Amendment infringement in meeting any governmental interest. Even if the government were seeking to meet a substantial purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). A much more narrow, as well as objective, means of determining the viability or seriousness of a candidate would be to use the law which the people of Arkansas had already set forth for ballot access.

AETN's exclusion of Forbes from a limited public forum with no compelling justification to which the exclusion is narrowly drawn violates the First Amendment. The Eighth Circuit's judgment was correct and should be upheld.

II. REGARDLESS OF THE NATURE OF THE FORUM, AETN'S EXCLUSION WAS VIEWPOINT DISCRIMINATION AND UNREASONABLE IN VIOLATION OF THE FIRST AMENDMENT.

As a separate and additional First Amendment violation, AETN's actions were viewpoint-discriminatory and unreasonable. Even in a non-public forum, the government may not exclude a speaker on the basis of viewpoint, and its restriction on speech may not be unreasonable. *See Cornelius*, 473 U.S. at 811. When the government elects to subsidize private speakers, it must do so in a viewpoint neutral manner. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, ___ U.S. ___, 115 S.Ct. 2510, 2516 (1995). The government "may not favor one speaker over another." *Id.*; *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). AETN violated this important prohibition.

This Court has stated it has an obligation to "make an independent examination of the whole record" to ensure that there is no "forbidden intrusion on the field of free expression." *New York Times*, 376 U.S. at 284-86. This independent review specifically applies to judgments regarding viewpoint neutrality. *See Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505 (1984) (holding "[t]he principle of viewpoint neutrality that underlies the First Amendment itself . . . also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected"). Examination of the record and AETN's own arguments reveal viewpoint discrimination.

A. Subjective Animus By The Government Is Not Required.

The jury below was asked and found that Forbes was not excluded "because of *objections or opposition to* his views." (App. 23a (emphasis added)) This question does not, however, end the First Amendment inquiry regarding viewpoint discrimination. While one of AETN's employees gratuitously

offered her opinion that Forbes was a member of the "American Nazi Party," (Tr. 295 (A. Oliver), J.A. 142) and another told him AETN would rather run reruns of "St. Elsewhere" than air the debate including Forbes, (Tr. 127-29 (O. Goss), J.A. 85-87), such subjective opposition or hostility is not necessary to establish a viewpoint-based exclusion. Illicit intent or bad motive is sufficient, but it is not necessary. *See Minneapolis Star & Tribute v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Turner I*, 512 U.S. at 685. The question is simply whether the government's actions restricted speakers in a way that favors some viewpoints over others. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (stating "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (quoting *Taxpayers for Vincent*, 466 U.S. at 804). AETN's restriction of Forbes was certainly a government action based upon the exclusion of minority viewpoints for the benefit of majority viewpoints.

B. AETN's Actions And Exclusion Criteria Are Viewpoint Discriminatory And Unreasonable.

AETN violated the First Amendment prohibition against viewpoint discrimination and unreasonableness in at least four separate ways. It created an unfair political advantage favoring certain congressional candidates at the expense of another, and it based its exclusion upon its impermissible determination of Forbes' popularity, his wealth and fund-raising ability, and his supposed non-viability as a candidate.

1. AETN's Exclusion Created A Political Advantage For Certain Candidates At The Expense Of Another.

Striking at core political speech protections of the First

Amendment, AETN impermissibly used the power and authority of government to endorse or disfavor a candidate or candidates. Such use of power to give one side of a political debate an advantage to express its views to the public while restricting the other side amounts to viewpoint discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (holding it is impermissible to "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978) (holding it is impermissible "to give one side of a debatable public question an advantage in expressing its views to the people"); *Rosenberger*, 115 S.Ct. at 2548-49 (Souter, J., dissenting) (noting it is impermissible for government "to allow one message while prohibiting the messages of those who can reasonably by expected to respond").

AETN gave two sides of a political debate a televised platform for public expression while suppressing the only other side to the contest. AETN's actions directly fit the definition for viewpoint discrimination, whether or not it did so to "oppose" or "object to" Forbes' views. In its own brief before this Court, AETN states its goal was to present "*the views* of the candidates in whom the viewing audience was most interested," (Pet. Brief at 29 (emphasis added)), and thereby reveals its decision was viewpoint-based.[13]

The *Rosenberger* decision presents an excellent example of similar viewpoint-based discrimination. The Court nowhere required proof that the University of Virginia restricted the students' speech and money because it was hostile, or opposed, to the religious speakers. Yet, this Court still found viewpoint discrimination as the government's basis. *Rosenberger*, 115 S.Ct. at 2525. The four-Justice dissent also would have found

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[13] Further, as AETN states in its brief to the Eighth Circuit Court of Appeals, "[a]s a practical and foreseeable matter, the decision screened out the viewpoints of all but the major party candidates." (J.A. 216)

viewpoint discrimination if debate had been skewed in favor of one side or another instead of all sides. *Id.* at 2549-51 (Souter, J., dissenting). Setting forth a definition of viewpoint discrimination, the dissent explained,

> [i]t is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. *Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.*

Id. at 2549 (emphasis added). AETN clearly violated this requirement of neutrality. The government assisted two of the three qualified candidates to espouse their views, but specifically banned the third.

The major-party candidates received free coverage and promotion of their views, all at government invitation and expense. The one and only other side of the debate who could reasonably be expected to respond, the only other qualified candidate, was denied such benefits. Moreover, AETN's two-candidate debate communicated a message to the public of a generalized government endorsement of the major-party candidates and, by extension, a non-endorsement or disapproval of Forbes. Such favoritism was also buttressed by AETN's newspaper advertisement, which stated, "Do you know *your candidates?*" and encouraged the public to get better acquainted with "*the candidates*," naming and picturing only the Republican and Democrat. (Pl. Exh. 13, J.A. 174) AETN's actions amount to a government endorsement of two of the three qualified candidates for office, by both its advertisement and its presentation of only two candidates to the public. Such discrimination among sets of political viewpoints is constitutionally prohibited.

AETN's message to the public was clear: Forbes is not a legitimate candidate. Such governmental breaches of neutrality in a political campaign are exactly what viewpoint discrimination prohibitions are designed to prevent.

2. AETN's Use Of "Popularity" As An Exclusion Criterion Is Viewpoint Discriminatory And Was Unreasonably Applied.

AETN's exclusion on the basis of "popular" support is also unconstitutional viewpoint-based discrimination and an unreasonable basis for its exclusion of Forbes. Popularity is specifically and inherently based on the public's likes and dislikes of the views expressed by the candidates. It is unquestionable that the government may not premise its restriction of free expression on the unpopularity of the speaker's views. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *New York Times*, 376 U.S. at 271. AETN's use of "popular" support as a basis for excluding Forbes is simply a government restriction based upon response to his views and is thus viewpoint-based.[14]

AETN attempts to shield itself from the First Amendment by hiding behind its perceptions of what the public wants. AETN contends it is not its own view of Forbes' campaign message but the campaign message's "popular" support upon which it bases its decision. The public reaction or response to a message, however, depends on its content and

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[14] A term such as "newsworthiness" is likewise based on the substantive message of the speaker and thus a discriminatory basis. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *Chandler*, 917 F.2d at 494 (Clark, J., dissenting) (finding newsworthiness "viewpoint discrimination").

viewpoint and is categorically not a valid basis for restricting free expression. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Texas v. Johnson*, 491 U.S. at 412; *Boos v. Barry*, 485 U.S. 312, 321 (1988).[15] AETN's basis is, therefore, impermissible under the First Amendment. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).[16]

In addition, even if AETN's viewpoint discrimination were ignored, its application of the "popular support" standard was unreasonable. Despite its attempts to convince this Court that Forbes had "no popular support," the facts of Forbes' political career belie such assertions. In 1986, for instance, Forbes won 46.98 percent of the vote in a statewide race for the Arkansas Lieutenant Governor Republican Primary. (J.A. 153, 169-70) Two years before the 1992 AETN debate, Forbes ran again for Lieutenant Governor. In this three-candidate race for the Republican Primary, he won 46.88 percent statewide. (J.A. 149-151, 169, 171) In fact, in this race, Forbes carried a majority vote in 15 of the same 16 counties in the Third Congressional District. Two years later, AETN banned him from its debate for the congressional seat in this very district. AETN did not even speak to Forbes or the two dominant television stations in the Third Congressional District, nor did it ask about his popular support. (J.A. 148, 158, 161-62, 177-78) Such convenient analysis illustrates why one unelected

[15] AETN's infringement goes even further than these cases by basing its exclusion on its perception of Forbes' popular support. Even more subjective power is thus wrested by the government.

[16] In contrast to "popular" support, ballot qualification is not a facade for viewpoint discrimination. The Arkansas law under which Forbes qualified operates as a sieve that blocks "frivolous political office seekers," *Rock v. Bryant*, 459 F. Supp. 64, 73 (E.D. ARK. 1978), yet does not discriminate on the basis of viewpoint.

government official should not have the subjective and standardless discretion requested by AETN over such a crucial matter as the exclusion of a qualified, balloted candidate from a government-sponsored congressional debate. A reasonable person would not have sidestepped these historical facts nor failed to contact key sources of information. Thus, AETN's application of its own impermissible standard was not reasonable.

3. AETN's Use Of Wealth And Fund-Raising Capacity As Exclusionary Criteria Was Illegitimate And Unreasonable.

This Court prohibits the government from using wealth and fund-raising ability as a threshold requirement for political office. Specifically, "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability . . . ." *Buckley*, 424 U.S. at 49. In fact, the First Amendment prohibits "a system so heavily weighted in favor of the financially affluent, or those with access to wealth." *CBS v. DNC*, 412 U.S. at 123. Yet, Forbes' lack of personal wealth to finance his campaign was one of the major factors set forth by AETN to justify its exclusion. (Pet. Brief at 15, 33) Government censorship of a speaker, much less a qualified candidate for office, on the basis of financial status is impermissible. *See Bullock v. Carter*, 405 U.S. 134 (1972); *Morse v. Republican Party of Va.*, ___ U.S. ___, 116 S.Ct. 1186 (1996). AETN's denial of access to a political debate was unreasonable, since it was based upon an unconstitutional criterion.

4. AETN's Use Of Partisanship And Viability As Exclusion Criteria Is Viewpoint Discriminatory And Unreasonable.

A central basis for AETN's exclusion of Forbes was his perceived viability as a political candidate. While AETN on appeal posits "newsworthiness" as its standard for exclusion, it is a term used by none of its witnesses at trial as the basis for exclusion. Instead, AETN testified it excluded Forbes because he was not a viable candidate and thus viewers would not be interested in hearing from him. (J.A. 117-19, 126, 133, 136-38, 144, 147, 153) More specifically, AETN's answer filed in the instant suit states Forbes was excluded because, in the judgment of AETN, "plaintiff [Forbes] was not perceived as a viable candidate . . . ." (J.A. 57) The unanimous Eighth Circuit panel concluded the basis or "reason given" for Forbes' exclusion was whether AETN "considered Forbes a viable candidate." *Forbes II*, 93 F.3d at 504.

AETN's assessment of viability impermissibly discriminated on the basis of party affiliation. AETN automatically considered major-party candidates viable. Other candidates were not. The network's own witnesses, including its Executive Director, conceded Republicans and Democrats were treated differently from Forbes solely because of their party and AETN's consequential assumption of support. (J.A. 133-35, 137-38, 140) For instance, Forbes was required to prove monetary and actual "popular" and media support in order to prove his viability. In one of its other congressional debates, however, AETN invited an "unknown" candidate to participate despite his not having raised as much money as Forbes and without AETN's requiring any actual public or media support. (J.A. 133-34, 136-38, 175) When questioned, AETN's own Executive Director conceded he was automatically included because he was the Republican candidate. (J.A. 133-37) For major-party candidates, support was assumed even if it did not exist or the candidate was an unknown.

A political party is, at its base, a group of individuals associated on the basis of their political views. To discriminate on the basis of party affiliation is, therefore, to discriminate

against a set of views. Governmental exclusion from a political debate on the basis of party affiliation is thus viewpoint discrimination. *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S.Ct. 2374, 2399 (1996) (Stevens, J., concurring) (stating "[i]f the Government spared all speech but that communicated by Republicans from the control of the cable operator, for example, the First Amendment violation would be plain"). Similarly, as Judge Clark stated, "a decision that excludes the Libertarians based on the fact that their views are less newsworthy than those of the major-party candidates is necessarily based on an estimation of the value and substance of their views [and thus] viewpoint discrimination . . . ." *Chandler v. Georgia Pub. Telecomm. Comm'n.*, 917 F.2d 486, 494 (11th Cir. 1990) (Clark, J., dissenting), *cert. denied*, 502 U.S. 816 (1991).

AETN even states in its brief before this Court that it excluded Forbes to give more time to the "serious," major-party candidates. (Pet. Brief at 14) The idea that

> government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information from diverse and antagonistic sources . . . ."

Buckley, 424 U.S. at 48-49 (quoting *New York Times*, 376 U.S. at 266); *Bellotti*, 435 U.S. at 790-91.

In fact, this Court has held that the mere appearance of such governmental partisanship is impermissible. In *United States Civil Service Commission v. National Association of Letter Carriers*, this Court stated,

> it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear to*

> *the public* to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

413 U.S. 548, 565 (1973) (emphasis added). The Court thus upheld restrictions on the First Amendment freedoms of federal employees. It would be untenable if government employees could be restricted in their First Amendment rights to avoid an "appearance" of partisanship, and yet the government itself could engage in open favoring of certain parties or candidates on television before the public. AETN's viewpoint discrimination in the instant case thus provides another separate basis in support of the Eighth Circuit's judgment.

Arguments that since the government is airing the program, government is the speaker and thus viewpoint discrimination does not apply are without merit and disingenuous. The very essence of the debate in question was public discourse by *private speakers*. When private speakers and expression are involved, unlike when only government is speaking, the First Amendment applies. *See CBS v. DNC*, 412 U.S. at 139 and n. 7 (Stewart, J. concurring). Otherwise, for instance, as in the instant case, the government could hold political debates across the country engaging in viewpoint discrimination on any basis it desired, excluding all "conservative" or "religious" candidates, or just those who advocate funding public television. When government restraint involves private expression, viewpoint discrimination is prohibited.

III. AETN'S ACTION INFRINGED UPON CORE POLITICAL SPEECH AS WELL AS VIOLATED CONSTITUTIONAL PROHIBITIONS AGAINST GOVERNMENTAL USE OF SUBJECTIVE DISCRETION TO SUPPRESS FREE SPEECH.

Political speech of a candidate is at the core of the First Amendment, and its freedom from government coercion and censorship is a necessity for any truly free democratic society. AETN seeks the unbridled power subjectively to determine which candidates are worthy to participate in government-sponsored and -planned debates. Such power is dangerous because it effectively allows the government subjectively to influence the outcome of an election. The First and Fourteenth Amendments prohibit such subjective power being placed in the hands of government officials. Therefore, even absent forum analysis, such core liberties may not be infringed by the government's use of subjective and unfettered discretion.

A. The Nature Of Forbes' First Amendment Rights Requires Heightened Protection.

A "major purpose" of the First Amendment is to protect from government censorship the free discussion of issues by candidates. *Buckley*, 424 U.S. at 14. Government encroachments on such speech, therefore, trigger the First Amendment's "fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)); *Buckley*, 424 U.S. at 15. Debate by candidates for public office goes to the very core of the First Amendment and receives "the broadest protection . . . ." *Buckley*, 424 U.S. at 14. Forbes' right to challenge his political opponents' views in a government-sponsored debate deserves the fullest, most urgent, and broadest protection under the First Amendment.

AETN's actions impinge not only upon Forbes the candidate but upon voters as well. For decades, this Court has recognized the "right to equal treatment in the voting process." *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 n.74 (1973). The "rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates

always have at least some theoretical, correlative effect on voters." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock*, 405 U.S. at 143). Since voters can exercise their preferences only through candidates or parties, exclusions of candidates affect their rights to cast their votes in accordance with their beliefs. *Id.* at 787. Excluding Forbes because he was not "popular" or a majority figure, in the government's opinion, thus impacted not only many people who had previously voted for him, (Pl. Exh. 3, Tr. 113, 115, J.A. 169-171), but all those holding non-majority views who would have wished to associate with his views in the current election.

The undoubted effect of AETN's approach is to exclude minority voices and viewpoints. Even if third-party candidates do not win, their campaigns often educate the public, advance creative and sometimes unpopular ideas, protest the current political order, and even influence the outcome of the election for the other candidates. (J.A. 172 (reporting the instant 1992 congressional race was decided by less than three percent of the vote)) An election campaign is as important in its dissemination of ideas as is the actual election of a candidate. A systematic process that excludes such minority voices flies directly in the face of the First Amendment. *See Lee*, 505 U.S. at 702 (Kennedy, J., concurring) (stating government is not "to tilt the dialog[ue] heard by the public, to exclude many, more marginal, voices"). As Justice Douglas argues, the First Amendment does not permit

> broadcasting - now our most powerful media - [to] be used to subdue the minorities or help produce a Nation of people who walk submissively to the executive's motions of the public good.

CBS v. DNC, 412 U.S. at 167 (Douglas, J., concurring). This Court, in fact, has stated there is an important governmental interest in promoting dissemination of ideas from a multiplicity

of sources. *See Turner Broad. Sys., Inc. v. FCC*, ___ U.S. ___ (1997) (slip op. at 6). Even the right of free speech of a *private* broadcaster "does not embrace a right to snuff out the free speech of others." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969).

Moreover, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390; *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (noting "[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both"). The consequence of AETN's exclusion of Forbes thus also collides with the rights of viewers. Viewers and their party candidates are shackled by a government system of exclusion of minority voices. AETN's own policy even suggests the importance of protecting such minority views to

> further the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens and voters to make informed judgments . . . .

(App. 101a)

How many of Forbes' past substantial number of voters, (P1. Exh. 3, J.A. 169-71), were encouraged by the government's message to switch their vote from Forbes? How many were deceived into thinking Forbes was not a qualified candidate? No one will ever know. But the chances that governmental power tipped the scale of the electoral process and influenced the outcome of this election are very real.[17]

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[17] AETN's suppression is particularly injurious in light of the "electorate's increasing dependence on television, radio, and other mass media" as "indispensable instruments of effective political speech." *Buckley v. Valeo*,

As this Court has recognized, the people are the best "judges of who ought to represent them." *Powell v. McCormack*, 395 U.S. 486, 541 n. 76 (1969) (citing 2 DEBATES ON THE FEDERAL CONSTITUTION 292-93 (J. Elliot ed. 1876)). "[E]ach person should decide for him or herself, the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest on this ideal." *Turner I*, 512 U.S. at 641; *Denver Area*, 116 S.Ct. at 2405 (Kennedy, J., concurring in part, dissenting in part). The people of Arkansas have already decided which persons are viable candidates by establishing official ballot thresholds. ARK. CODE ANN. § 7-7-103(c)(1). One unelected government official may not subsequently disqualify a candidate by substituting his or her own perception for that of the people of Arkansas. Whether Forbes was ultimately viable or not was "a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Forbes II*, F.3d at 504-05.

Candidate speech in a state-convened and -broadcast debate is thus unique. It affects not only the speaker, but also the voters, the viewers, and the electoral process. The continuation of a free society rests upon its careful protection. Any subjective governmental action which interferes with this process should be highly scrutinized and disfavored. "[N]o official, high or petty, can prescribe what shall be orthodox in politics . . . ." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In addition, AETN's censorship was a prior restraint on Forbes' political speech. "Any prior restraint on expression comes to this Court with a heavy presumption against its

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424 U.S. at 19; *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S.Ct. 2374, 2414 (1996) (Kennedy, J., concurring in part, dissenting in part).

constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Southeastern*, 420 U.S. at 558. AETN "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Keefe*, 402 U.S. at 419. This is a burden AETN cannot carry. The nature of Forbes' speech and the importance of the broadcast's effect on the public's choice in voting are vital to maintaining a democratic society and require strict scrutiny, even without forum analysis.

B. AETN's Infringement Of Forbes' Fundamental Liberty Under The Fourteenth Amendment Requires Heightened Scrutiny.

AETN's actions in excluding a political candidate from a government-sponsored debate trigger not only the right of political campaign speech and voters' rights at the core of the First Amendment, but Fourteenth Amendment rights as well. As this Court has stated, core political expression is a "fundamental" right protected by the Due Process Clause of the Fourteenth Amendment. *Bellotti*, 435 U.S. at 780. Few rights could be more fundamental to "liberty" than the right of a candidate, who has duly qualified for the state ballot by the rules set forth by the people of his or her state, to be treated fairly and equally by the government. Government's use of its power to endorse or favor one candidate and disfavor another strikes at the very heart of a free society, which cannot tolerate direct governmental influence of election results. Infringement of a fundamental right by the government can be justified only by a compelling governmental interest necessitating such an infringement and effectuated in the least restrictive means. *See Wisconsin v. Yoder*, 406 U.S. at 214; *Roe v. Wade*, 410 U.S. 113, 152 (1973). AETN's banning of only Forbes from the political debate thus triggers strict scrutiny.

C. AETN's Use Of Subjectivity To Infringe Core First And Fourteenth Amendment Rights Fails Strict Scrutiny.

Since AETN's actions are a prior restraint on speech and implicate the most urgent protections of the First Amendment for core political speech and campaigns, as well as the fundamental liberty protections of the Fourteenth Amendment, its standardless and subjective discretion is insufficient to withstand scrutiny.[18] The government may not be allowed subjectively to act to influence the outcome of an election. Such government actions should be required to meet "narrow, objective and definite standards," and AETN may not vest "unbridled discretion in a government official." *Forsyth County*, 565 U.S. at 131, 133; *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Kunz v. New York*, 340 U.S. 290, 295 (1951). A subjective standard is defined as discretion "involv[ing] appraisal of facts, the exercise of judgment, and the foundation of an opinion." *Forsyth County*, 565 U.S. at 131 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)). AETN's system is clearly subjective and does not meet First Amendment requirements.

As the Eighth Circuit noted, AETN conceded its criteria were "essentially subjective." *Forbes II*, 93 F.3d at 504. In addition to AETN's admission, the facts below reveal the government subjectivity exercised. AETN refers to Forbes as a perennial candidate with "no support," yet he received 46 percent of the vote in two statewide elections, including carrying a majority of 15 of the 16 counties of the instant Congressional District in a three-person race two years before his exclusion. (J.A. 149-51, 169-71) AETN supposedly carefully researched Forbes' media interest, yet it never called and checked with Forbes or the two dominant television news stations for the

[18] Forbes' argument here is separate and in addition to forum analysis. Forbes asserts here AETN's influencing a political campaign violates the First and Fourteenth Amendment without narrow and objective standards. This violation thus serves as a separate basis supporting the Eighth Circuit's judgment.

Third Congressional District. (J.A. 148, 158, 161-62, 177-78) AETN had no written policies to apply as to whom to exclude from the debate, and in fact went directly against its own policy of enhancing the diversity and full range of viewpoints for citizens and voters to consider. (App. 100a) It allegedly applied standards of monetary and popular support to Forbes but not to Republican candidate Dennis Scott, "an unknown." (J.A. 133-37, 175) AETN applied popularity and newsworthiness standards, which in and of themselves are inherently subjective and require perception and opinion. In determining the needs and interests of viewers, as AETN's own witness stated, "there are no rules in journalism." (J.A. 148) The editorial discretion AETN seeks is clearly unfettered discretion. Such unfettered discretion is not permitted in a government official acting in prior restraint of speech, especially where it affects speakers, voters, viewers, and the electoral process.

A similar case of unfettered discretion was presented in *Forsyth County*. In *Forsyth County*, a government administrator was permitted to vary a permit fee based upon his or her perception of the expected listener response which would consequently increase the cost of maintaining order. 505 U.S. at 124. This Court held such unbridled, subjective discretion in a government official is prohibited by the First Amendment. Likewise, AETN seeks unfettered editorial discretion in one unelected official to restrict the speech of minority candidates. It also bases its decision on its perception of the viewers' response and popularity of the speaker. Actually, the instant case is much worse. The speaker is a qualified political candidate, and his two opponents have been granted permission to speak. Additionally, the burden placed on Forbes was not just the increase of a fee but a complete denial and exclusion.

In *Buckley*, this Court upheld a differing treatment of political parties based on an objective standard laid out in advance and based upon the votes of the people. 424 U.S. at 87-89. Through years of painstaking legislative and judicial

effort, the people of Arkansas laid out their own objective threshold to test the seriousness of their candidates. ARK. CODE ANN. § 7-7-103(c)(1), (3). Ignoring the manifest will of the people, AETN seeks to supplant the citizens' standard with a subjective standard of its own. It seeks the power to evaluate particular candidates for office and exclude them on the basis of its perception of their worthiness for the debate. The First and Fourteenth Amendments prohibit such unbridled discretion over such fundamental political expressions. The government may not use its power and authority to throw its weight behind one or more candidates as against another, absent strict, narrow, definite, and objective standards assuring constitutional compliance. Such a narrow and objective standard existed in Arkansas; AETN chose to disregard it. Thus, its decision is not narrowly drawn and violates strict scrutiny.

IV. AETN IS RESTRICTED BY, AND NOT PROTECTED BY, THE FIRST AMENDMENT.

AETN is "an agency of the State of Arkansas," and is owned and operated by the State. (Pet. Brief at 2) Despite its admitted governmental character, AETN argues it is not bound by and should receive affirmative protection under the First Amendment. (Pet. Brief at 39-46) While this argument is a central theme of AETN's defense, the argument is without merit or support. AETN is a state agency and "part of the Government for purposes of the First Amendment" and thus restrained by it. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

AETN is requesting this Court to hold that it, the government, is protected under the First Amendment from suits by private citizens including Forbes. AETN has it completely

backwards.[19] The Constitution protects private citizens from the government. It does not protect the government from private citizens. "The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government." *CBS v. DNC*, 412 U.S. at 139 (Stewart, J., concurring) (emphasis in original); *see also Lee*, 505 U.S. at 695 (Kennedy, J. concurring) (stating "[t]he First Amendment is a limitation on government, not a grant of power"); *Turner I*, 114 S.Ct. at 2480 (O'Connor, J., dissenting) (stating "the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression, and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals"). The First Amendment is a restraint on government action, not a protection against private citizens. *See CBS v. DNC*, 412 U.S. at 114. As the Eighth Circuit properly noted, "[t]he First Amendment exists to protect individuals, not government." *Forbes II*, 93 F.3d at 505.

AETN's extensive argument attempting to establish it is independent from higher government officials is irrelevant. AETN is the government. AETN cites no cases to support the novel proposition that lower-level government employees do not violate the First Amendment unless they are receiving pressure to do so from higher level government officials. "[N]o official, high or petty" may violate the First Amendment. *Barnette*, 319 U.S. at 642.

AETN's arguments under past media cases are also unavailing. Each of these decisions involved *private* broadcasters, who are, of course, protected by the First Amendment. As stated above, AETN is restrained by the First

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[19] Even the Solicitor General, on behalf of the FCC, while filing an *amicus* brief on AETN's side, notes that this argument is without merit. *See* "Motion of FCC to Participate in Oral Argument" at 4, n. 2.

Amendment. Cases involving the First Amendment rights of private broadcasters versus governmental and FCC attempts to provide a diversity of viewpoints in a scarce spectrum create a complex dilemma. Both sides are seeking the same end of providing for a diversity of viewpoints. Such a conflict, and thus complexity, does not exist in the instant case. Government AETN seeks not to increase but to decrease the diversity of viewpoints in the debate. As a result, AETN seeks to avoid application of the First Amendment altogether. Promoting expression of a diversity of viewpoints supports only Forbes. AETN's citation of these media cases involving private broadcasters thus does not support any position of *reducing* First Amendment protections or applications.

Arguments that the First Amendment should not apply to public broadcasters because they are subject to FCC oversight are also without merit. There is no precedent in American jurisprudence for the proposition that government may avoid constitutional mandates because another government agency oversees its actions. Alleged accountability to a government agency does not excuse lower-level government entities or officials from compliance with the U.S. Constitution.

AETN also argues it is not a state actor under *West v. Atkins*, 487 U.S. 42 (1988), and *Polk County v. Dodson*, 454 U.S. 312 (1981). While AETN asks that a state actor be considered a private actor, *West* analyzed the inverse question of whether a private doctor was a state actor. Finding he was performing a public function in treating prison inmates, this Court held he was engaging in action attributable to the State. West, 487 U.S. at 54.

Even if *West* were relevant for turning the government into a private actor, it is not helpful to AETN in the instant case. AETN's act and decision to exclude are not attributable to any private party or entity. Additionally, the exclusion in question was not the performance of any exclusively private

function. *West* is therefore not helpful to AETN. Under AETN's approach, any government official performing a function also performed by private industry could conveniently claim he or she was not a state actor and thus not bound by the Constitution. This is not the law.

Polk County is also not supportive of AETN's position. In *Polk County*, a county public defender was held not to be a state actor because he was performing a role inherently or necessarily adverse to the government. *See Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (explaining *Polk County*); *Polk County*, 454 U.S. at 323, n. 13. As this Court stated, *Polk County* is "the only case in which this Court has determined that a person who is employed by the State and who is sued under §1983 for abusing his position in the performance of his assigned tasks was not acting under color of state law." *West*, 487 U.S. at 50.

AETN is not adversarial to the government. The briefs of government *amici*, all filed in favor of AETN, as well as AETN's own arguments that it has a compelling interest in complying with the FCC, make clear AETN's cooperative and not adversarial role. AETN's argument that media have a role inherently adversarial to the government is without merit. The First Amendment and numerous other statutes set forth the clear governmental goal and requirement to protect and promote freedom of speech and the press, not attack it.

Unlike a public defender, whose very job is to fight the government prosecutor in court, AETN has no such inherent conflict or adversarial role. If AETN's broad adversarial theory were correct, all statutes and constitutional provisions would make particular government actors adversaries of the government in such areas, since the government actors might someday violate such provisions.

AETN is an agency of the State of Arkansas. It is

government-owned and -operated. Its request to avoid compliance with the First Amendment is simply an attempt to use the power of government without the corresponding accountability. It takes the tax money of the people, uses the power of eminent domain, and uses the attorney general as its attorney, and its shows may continue even if they are unpopular. It is not a private actor. It is the government and thus a state actor required to comply with the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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ARGUMENT

I. MR. FORBES' METHOD OF FORUM ANALYSIS IS IRRECONCILABLE WITH *CORNELIUS'* TEST BASED ON THE GOVERNMENT'S INTENT.

As did the Eighth Circuit below, Mr. Forbes and his supporting *amici* argue this case by stating important facts as they would like them to be, rather than as they are in the record, or by ignoring critical facts altogether. By recasting the record, they attempt to ordain the result.

Nowhere is this vice more apparent than in Mr. Forbes' restatement of AETN's intent in holding the debate:

> Under its own factual recitation, [AETN] intentionally opened up government property for *outsiders* to engage in free expression and discourse in the limited context of a congressional debate.

(Resp. Br. at 15; emphasis supplied) This statement is inaccurate because it is incomplete. The record shows repeatedly, without contradiction, that AETN did *not* intend to open the debate to all "outsiders" or even to all Third District candidates. Its intent was specific: to serve AETN's viewers by inviting only those candidates in whom the public was interested.[1/] No testimony in the record supports Mr. Forbes'

1/ Explaining why she accepted her staff's recommendation not to invite Mr. Forbes, Ms. Howarth testified: "[My staff] had done some research, checked out what kind of press coverage [Mr. Forbes] was getting, what kind of popular support he had from the district. . . .[T]he debates were

characterization that AETN was opening the debate to all "outsiders," to all candidates, or to all candidates who qualified for the ballot. When demonstrated public interest in the 1992 election is viewed as the test,[2/] Mr. Forbes is not a "similarly situated" speaker under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983), as Forbes tries to argue. (Resp. Br. at 18)

This recitation of AETN's intent is consistent with Ms. Howarth's aim of creating a debate that met the FCC's exemption from equal opportunities for on-the-spot coverage of a bona fide news event (App. 103a). The key element in a program exempt from equal opportunities under 47 U.S.C.

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designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for their benefit." (J.A. 117) She explained further: "We were trying to reflect what the viewers and the voters were telling us in the information that we had received." (J.A. 119)

2/ Ms. Howarth and Ms. Oliver considered Mr. Forbes' lack of earlier political success. However, their testimony shows that the decisive factors against inviting him were various indicators that Mr. Forbes was receiving no public support in his 1992 campaign. His earlier record as a candidate was simply one of many factors, and not the most important. (J.A. 118-20, 126-27 (Ms. Howarth), 141-42, 144, 152 (Ms. Oliver)) Consequently, Mr. Forbes' emphasis on the fact that he did well in two prior primaries (though never winning any office) (Resp. Br. at 8) is misplaced. It seizes on events before the 1992 campaign, overlooks his overall history of generating little or no public interest, and does not diminish the fact (even in Mr. Forbes' own description (J.A. 95)) that the Third District voters ignored his campaign in 1992.

§ 315(a) is that it be a news program.[3/] Thus, although Ms. Howarth and Ms. Oliver at trial never used the word "newsworthiness," their testimony is devoted to explaining how and why they exercised news judgment in this case. News judgment requires editors to select subject matter, *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119, 124 (1973) ("*CBS v. DNC*"); and at AETN, by virtue of its written policies, the selection process is based on criteria used generally in the news business. *Programming Policy Statement for AETN* ("*Programming Policy Statement*") (App. 96a ("industry guidelines and standard practices")); *Statement of Principles of Editorial Integrity in Public Broadcasting* ("*Principles*") (App. 64a, 82a ("generally accepted broadcast industry standards")).

By misdescribing AETN's intent as reflected in the record, Mr. Forbes points the Court down a trail that AETN never took. Only by ignoring the intended class – candidates judged to be newsworthy by virtue of their public support in the 1992 campaign – can Mr. Forbes claim that AETN "created a limited public forum for the congressional debate." (Resp. Br. at 18)

Indeed, ignoring the crucial details of AETN's intent creates the predicate for Mr. Forbes' argument that AETN intended to open the debate for a "public discourse" that must

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3/ *See generally Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd mem. sub nom. League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984); 47 C.F.R. § 73.1941(a)(4); *In re Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 684 (1991), *recon. granted in part*, 7 FCC Rcd 4611 (1992).

include all candidates qualified for the ballot in the Third District. (Resp. Br. at 14-16) Certainly AETN intended newsworthy candidates to discuss the campaign. That is a limited discourse. By concentrating on the phrase "public discourse" in isolation from the record testimony, Mr. Forbes asserts that AETN unintentionally opened the debate to discourse by the class of participants as Mr. Forbes would like it defined. This approach would nullify the instruction in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."

Mr. Forbes and various *amici* in fact have proposed a new legal rule that contradicts *Cornelius'* emphasis on the government's intent. This rule works by operation of law rather than by a factual inquiry into the government's intent. Under this rule, and regardless of intent, any state entity that sponsors a candidates' debate must include all candidates who have qualified for the ballot. (Resp. Br. at 15-18) Mr. Forbes and *amici* seek to fortify this new rule with arguments about the importance of third parties in U.S. history and the fact that candidates' speech is protected under the First Amendment. However, these uncontroversial assertions do not obscure the fact that Mr. Forbes' approach can succeed only by departing from the analysis that *Cornelius* demands.[4/]

4/ Mr. Forbes, trying to circumnavigate *Cornelius*, offers strawmen. For example, he argues that AETN sets the Communications Act above the First Amendment when AETN asserts a compelling interest in maintaining licensee control – editorial judgment – over the debate. (Resp. Br. at 24) That simply is not so. Rather, AETN points to this requirement of the Communications Act only as evidence of its intent to control the debate, among other ways, by selecting only newsworthy participants. (Pet. Br. at 25-26, 27-28)

Mr. Forbes' war with *Cornelius* is apparent in his argument that AETN's intent is a "circular argument." (Resp. Br. at 18) A similar point was made in dissent in *Cornelius*.[5/] *Cornelius'* emphasis on intent does give government the option to establish a nonpublic forum when, by choosing differently, it could have opened a limited public forum. But, contrary to the assertions made repeatedly by Mr. Forbes and his *amici*, this does not mean that government is left to trample First Amendment values in a standardless world. (*See* Resp. Br. at 44-45, citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and similar cases.) Rather, intent under *Cornelius* is bounded by the requirement that government not engage in invidious discrimination. *See generally American Party of Texas v. White*, 415 U.S. 767, 781-82 & nn.13-14 (1974); *McLaughlin v. Florida*, 379 U.S. 184, 190-91 (1964) (courts must determine whether classification is reasonable in light of its purpose or is arbitrary); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

5/ In essence, the Court today holds that the First Amendment's guarantee of free speech . . . reduces to this: when the Government acts as the holder of public property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint.

Cornelius, 473 U.S. at 814 (Blackmun, J., dissenting) (citation omitted).

In actuality, Mr. Forbes was seeking disparate, especially advantageous, treatment from AETN. As Ms. Howarth testified, he was seeking access to a debate platform to which a candidate was not entitled unless he had already garnered demonstrable public support. (J.A. 119, 123) Ms. Howarth correctly observed that giving in to Mr. Forbes' demand for disparate treatment would have damaged the hard-earned trust AETN had built with its viewers. (J.A. 112)

This analysis also demonstrates why AETN's invitations to Republican Party candidates in other 1992 races cannot be lumped with its treatment of Mr. Forbes. Ms. Howarth testified without contradiction that nomination by a major political party is evidence by itself of significant support, and therefore of newsworthiness. (J.A. 134-39) Mr. Forbes' criticism actually proves AETN's point that it adhered to an editorial process that put the audience's interests first. (J.A. 113)

This is not as bright a line as the test that Mr. Forbes suggests, but it is more practical. *See generally* the *amicus* briefs of the City of New York, the State of New Jersey, and the Commission on Presidential Debates.

II. AETN'S EXCLUSION OF MR. FORBES WAS NOT VIEWPOINT-BASED.

Mr. Forbes argues that, because he has views, any chain of events that results in his exclusion must, perforce, be viewpoint-based. "The question is simply whether the government's actions restricted speakers in a way that favors some viewpoints over others." (Resp. Br. at 30) This argument ignores the jury's special verdict, distorts the record, and confounds this Court's holdings.

Mr. Forbes glosses over the jury's second finding (App. 23a) that AETN did not exclude him from the debate because of objections or opposition to his views. (Resp. Br. at 31) Mr. Forbes' charge that AETN discriminated against him based on his viewpoint runs headlong into the jury's contrary finding. This finding is amply supported by Ms. Howarth's and Ms. Oliver's testimony that – whatever Mr. Forbes' views – he was judged to be of little or no interest to the viewing audience, because people in the Third District had given virtually no support to Mr. Forbes' candidacy. (J.A. 118-20, 126-27, 142-44, 152) Because Mr. Forbes and his *amici* cannot gainsay the jury's finding, there is no reason to override it.

Mr. Forbes and his *amici* argue that his exclusion was viewpoint-based, relying on *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510 (1995). But *Rosenberger* supports finding that AETN's decision was not viewpoint-based. In *Rosenberger*, the university expressly excluded funding for a publication on the ground that it was written from a religious viewpoint. Here, in stark contrast, the exclusion of Mr. Forbes had nothing to do with his viewpoint. That is best illustrated by the fact that neither Mr. Forbes nor any of his *amici* identify any viewpoint of Mr. Forbes that was silenced. The record is barren of any description of Mr. Forbes' views.

Mr. Forbes also relies on the dissent in *Rosenberger*, 115 S. Ct. at 2548-49, for the proposition that it is impermissible for government to allow one message while prohibiting responsive messages. (Resp. Br. at 31) However, as the dissent observes,

> The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular

> viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint.

115 S. Ct. at 2548 (Souter, J., dissenting; reference omitted). Here, exclusion from the debate was explained solely by reference to the lack of discernible public support of and interest in Mr. Forbes in the 1992 election, and – as found by the jury – is *not* to be explained by reference to his views.

Mr. Forbes' analysis also fails to place the question of viewpoint discrimination in the larger context of forum analysis, as *Rosenberger* requires:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 2517 (citation omitted). In this case involving a nonpublic forum, the excluded class is not defined by reference to "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* Rather, the class of speech excluded is that of candidates in whom the public had shown little or no interest in the 1992 Third District campaign.

III. AETN, OPERATING UNDER POLICIES THAT REQUIRE IT TO FUNCTION AS AN INSTITUTION OF THE PRESS, IS IN AN INHERENTLY ADVERSARY POSTURE TO GOVERNMENT.

Despite Respondent's unsupported protests to the contrary, an essential element of the press' role is as an adversary of the Government.[6/] As this Court has stated:

> [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mills v. Alabama, 384 U.S. 214, 219 (1966).

Last term, in *Reno v. American Civil Liberties Union*, No. 96-511, 1997 WL 348012 (U.S. June 26, 1997), this Court reaffirmed that "'[e]ach medium of expression . . . may present its own problems.'" *Id.* at *13 (citation omitted). Further, in deciding cases about broadcasting, the Court relies on historical

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6/ Respondent attempts to use the very presence of the First Amendment as proof of a non-adversarial relationship between the press and state. (Resp. Br. at 49) Yet the opposite must be true. "[A] press clause was necessary, not to induce the press to provide a check on governmental power, but because it was universally assumed that the press would indeed provide such a check and that government therefore would seek to suppress it." David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 491 (1983).

factors unique to the medium. *Id.* Prominent in the history of public broadcasting in this country is a shameful presidential attack "to curb public affairs programming in public television." WILLIAM J. MCGILL ET AL., THE LANDMARK REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST 44-45 (1979); *see also* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 129-30 (1987) (describing Administration attacks on public broadcasting's public-affairs programming). This history also includes implacable resistance to efforts by Congress to place special burdens on public broadcasters' editorial prerogatives. *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984); *Community-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (*en banc*); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

In *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justice Black recognized this historical tension:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would *remain forever free* to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . .

Id. at 717 (Black, J., concurring; emphasis supplied); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

As an institution of the press, AETN fulfills a role that is classified under these cases as fundamentally adverse to the government. AETN's editorial role correlates directly to the representational role of the public defender in *Polk County v. Dodson*, 454 U.S. 312 (1981).

Alexander Bickel wrote extensively on the fundamental adversarial nature of the relationship between the press and the government, which he refers to as an "adversarial game." In THE MORALITY OF CONSENT he said: "The contest between press and government is in a sense analogous to the collision between prosecutor and defense in our system of the administration of criminal justice. Ours is an adversary, accusatory system, as opposed to the European inquisitorial system." ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 81-82 (1975).[7/]

7/ This perspective illustrates why Mr. Forbes' reliance on *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Resp. Br. at 46), is misplaced. The National Railroad Passenger Corporation ("Amtrak"), the state actor in that case, has a very different mission from AETN. Certainly, Amtrak is not by policy directed to function as an institution of the press and to apply standards generally used in journalism to decisions about ongoing news coverage.

The record demonstrates this inherent adversarial relationship between AETN's editorial functions and the political and administrative organs of the State of Arkansas. AETC adopted the *Programming Policy Statement for AETN* (App. 96a) and the *Statement of Principles of Editorial Integrity in Public Broadcasting* (App. 64a) in order to establish AETN's editorial independence from the State of Arkansas. (Pet. Br. at 8-9) To secure the audience's trust, "[p]ublic broadcasters . . . must operate above suspicion of vulnerability to undue influence." *Principles* (App. 82a); testimony of S. Howarth (J.A. 110, 112, 114-15). The *Principles* exhort public broadcasters to win and maintain viewers' trust through devotion to integrity in programming:

> Editorial integrity is rooted in the traditional American values of freedom of speech and press. Tenaciously and courageously fought for by Revolutionary editors and pamphleteers, these values are codified in the First Amendment to the Constitution.

(App. at 87a-88a).

The fundamental adversarial nature of the relationship between the press and the government has a long legal history in this country, dating to before the nation's establishment. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977) ("[O]ne of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them."). These values are aimed at preserving the press' potential *at any time* freely to criticize government. *See also* Anderson, 30 UCLA L. REV. at 463-66 (explaining that the concept of free press prior to adoption of the U.S. Constitution

was that the press was free to criticize any part of government, an outgrowth of the hard-won freedom to denounce Britain's colonial government).

Consequently, it matters not, as *amicus* Natural Law Party ("NLP") argues (NLP Br. at 30), that AETN and the private press are only sometimes actually in an adversarial controversy with government. The record shows that AETN is *always* in position to criticize government. Under the *Principles* and AETN's *Programming Policy Statement*, maintaining the freedom to criticize government at any time is central to AETN's mission.[8] Moreover, it is uncontradicted in the record that AETN has successfully, sedulously guarded this freedom; and of course the jury specially found that all AETN's decisions respecting Mr. Forbes were indeed free of any political or administrative influence from the state (App. 22a).

IV. MR. FORBES' THEORIES FOR CURTAILING AETN'S JOURNALISTIC DISCRETION CANNOT BE LIMITED TO CANDIDATES' DEBATES, BUT WOULD EXTEND TO ALL AETN'S PROGRAMMING DEALING WITH PUBLIC CONTROVERSIES.

Mr. Forbes and various *amici* try to portray this as a very narrow case that would affect only political debates sponsored and broadcast by state-entity licensees. (Resp. Br. at 25; Brennan Center for Justice ("Brennan Center") Br. at 7, 12;

8/ "Trustees and station managers must master the intricacies of their legal circumstances and be prepared to seek remedy or exemption to any local or state regulation(s) which impair their ability to assure fidelity to the public trust which their broadcasting license represents." *Principles* (App. 84a).

American Civil Liberties Union ("ACLU") Br. at 5-6, 10-12; Perot '96 ("Perot") Br. at 5)

An editorial decision to exclude a candidate from a debate is no different from a broad range of programming decisions about a vast array of subjects, from elections to ballot issues to other controversies. The record in *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*"), and the decisions in *Marcus v. Iowa Pub. Television*, 24 Med. L. Rptr. 2531, 1996 WL 764143 (S.D. Iowa Oct. 9, 1996), *injunction pending appeal denied*, 97 F.3d 1137 (8th Cir. 1996), both explore the news judgments that are integral to sponsoring a candidates' debate, whether the broadcaster intends the program to be exempt from equal opportunities under 47 U.S.C. § 315(a)(4), as "on-the-spot-coverage," as in *Forbes II*, or under § 315(a)(2), as a "news interview," as in *Marcus*. (In *Marcus*, the jury specially found that the program was both a "debate," as that term was used in *Forbes II*, and a bona fide news interview program. 1996 WL 764143, at *2.) (The Senate cited *Meet the Press* and *Face the Nation* as examples of programs covered by the exemptions from equal opportunities in § 315 (a). *Political Primer 1984*, 100 F.C.C.2d 1476, 1496 & n.71 (1984).)

The jury in *Marcus* also found that no candidate could prove he was newsworthy. The District Court found that the candidates were excluded from Iowa Public Television's *Iowa Press* program "'on the basis of independent journalistic and editorial judgments.'" 97 F.3d at 1139. These findings show the illogic of classifying "debates" separately from all other news programming – and of replacing AETN's editorial judgment with a *per se* rule that all candidates qualified for the ballot are entitled to equal news exposure.

Were a *per se* rule adopted, there would be no confining it to traditional candidates' debates. As *Marcus* shows, candidates will demand access to programs in non-debate formats such as news interview programs, because candidates may appear there face-to-face. AETN might also broadcast newscasts or panel discussions that devote time to ballot-qualified candidates deemed newsworthy, while ignoring non-newsworthy ballot-qualified candidates. So there would have to be a constitutionally based rule of equal treatment there as well.

The rule logically might be extended further to programs about ballot questions such as environmental or tax issues, especially if various interest groups can demonstrate that they have more members in the state than another group whose representatives appeared. And, if the legislature is considering controversial bills, or if a bill is sent to the governor to face possible veto, those same interest groups can again argue that their representatives should appear on-air, because AETN's editorial judgment cannot be trusted. This is precisely the kind of wider impact that this Court considered in *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 652 (1981).

A political debate on AETN is part of news programming; and, in logic and practice, news decisions cannot be confined by the Procrustean rule Mr. Forbes seeks.

V. THE REQUIREMENT FOR AETN TO USE PREEXISTING "OBJECTIVE" CRITERIA IN SPONSORING THE DEBATE WOULD BE INCOMPATIBLE WITH FORUM DOCTRINE AND WITH AETN'S ROLE AS AN INSTITUTION OF THE PRESS.

Amici NLP and the Brennan Center argue that AETN cannot decide whom to invite to candidate debates without using a set of "objective" selection criteria that is published in advance of its use. They argue that this safeguard is necessary to prevent AETN from engaging in the sort of standardless decision-making that this Court has condemned when free speech and press rights are at issue. Their premise is that ballot qualification alone is a rational means for deciding which candidates should receive news coverage, at least when news programming is in the form of a debate. Both NLP and the Brennan Center rely on the Federal Election Commission's ("FEC's") rule (11 C.F.R. § 110.13) requiring debate sponsors, including broadcasters and newspapers, to use only "pre-established objective criteria to determine which candidates may participate in a debate." (NLP Br. at 24; Brennan Center Br. at 16, App. A (text of rule)). The Brennan Center also argues that press coverage of a candidate is an electoral benefit (Brennan Center Br. at 19), echoing Mr. Forbes' argument that the debate here is a government subsidy of private speakers. (Resp. Br. at 29)

This argument is flawed in several ways. Initially, we note that lists of "pre-established" criteria can yield varying results when applied according to the editorial judgments of different broadcasters. So the FEC's rule is more palliative than panacea.

Second, ballot qualification alone is not a sensible criterion on which to base news judgments involving candidate debates, including those sponsored by state-entity broadcasters. News decisions, whether or not involving ballot-qualified candidates, are not mathematical or mechanical. Rather, they typically involve weighing and balancing a list of factors, some predictable and others unique to the situation (and therefore not amenable to being listed in advance). This is the essence of the testimony of Ms. Howarth and Ms. Oliver, and of Iowa Public Television's program director, Daniel Miller, quoted in *Marcus v. Iowa Pub. Television*, 97 F.3d at 1143. Ballot qualification as an isolated factor is a test suited to the voting process, not to decisions about news coverage. *See also Buckley v. Valeo*, 424 U.S. 1, 101-03 (1976) (significant distinction between purpose of ballot access threshold and higher statutory threshold for general election funding).

Third, although the FEC's rule has never been tested in litigation, there are serious doubts that it could survive First Amendment scrutiny. This certainly is true as to any non-governmental press entity. If a newspaper or television station or network decided to sponsor a debate between or among federal candidates, to select the participants according to its news judgment, and to refuse to explain the basis for its decision to the FEC, that course of action would be protected under cases such as *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. DNC, 412 U.S. 94*; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); and *Mills v. Alabama*, 384 U.S. 214. Simply put, these cases (among many others) forbid a government agency from requiring editors to justify their journalistic judgments, even if the agency seeks the justification to aid in enforcement of campaign finance laws. This is an issue of facial invalidity.

The result should be no different for state-entity public broadcasters. Whether under forum analysis or an analysis based on *League of Women Voters - Polk County*, the state-entity broadcaster is entitled to make content-based news judgments that are inherent in structuring a candidates' debate that is designed to meet the audience's interests.

Under forum doctrine, the state-entity licensee must have a reasonable basis for making its decision. *Cornelius*, 473 U.S. at 800. Reasonableness does not demand that decisional criteria be limited to factors listed earlier on a public document. Rather, it condemns invidious discrimination. Editors remain entitled to the flexibility demanded of those making news judgements in an ever-changing world. The NLP and the Brennan Center may complain about the *ad hoc* nature of the news business, but the necessity for journalists to deal with changing circumstances does not abate simply because the news program in question is in the form of a debate rather than a newscast.

Under *League of Women Voters - Polk County*, so long as the editorial process is protected from state political interference, and absent invidious discrimination, the editorial judgements of a state-entity broadcaster are entitled to the same protection as those of any other editor.

VI. THE CANDIDATES' DEBATE WAS NOT GOVERNMENT SPEECH.

Amici United States and the FCC and the State of California, *et al.*, argue that the debate should be classified as "state speech." However, a review of cases discussing "state speech" reveals that they do not apply to instances where the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a

diversity of views from private speakers." *Rosenberger*, 115 S. Ct. at 2519.[9/] Forum analysis deals with the spectrum of instances where the government invites speakers to participate in an activity, as opposed to simply issuing a government declaration. In that sense, forum doctrine bounds the "government speech" doctrine. Therefore, AETC respectfully declines to embrace the arguments advanced by the United States and the State of California on this point.

CONCLUSION

Whether this case is analyzed under forum doctrine, with its emphasis on government's intent as the key starting point in classifying the forum, or under *League of Women Voters - Polk County*, AETN's use of news judgment to select debate participants should be upheld. If the debate is treated as a

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9/ *See also Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2448 (1995) (distinction between government and private speech endorsing religion); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (discussing government speech on religious topics); *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (adverting to respondent's argument based on "government speech" doctrine, that "'government may speak despite citizen disagreement with the content of its message'") (citations omitted); *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (difference between government and private speech endorsing religion); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 661, 664 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part) (discussing government speech about religion).

nonpublic forum, then AETN's exclusion of Mr. Forbes must be upheld because it was reasonable, was not viewpoint-based, and was not the result of invidious discrimination. If the debate is treated under *League of Women Voters - Polk County*, then AETN's editorial decision must be upheld because it did not result from, or constitute, invidious discrimination. Under either approach, AETN's legal capacity to continue making journalistic judgments would depend on its remaining insulated from state political pressure.

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit in *Forbes II* should be reversed, and the case remanded with instructions to enter judgment for defendants.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
PETITIONER

v.

RALPH P. FORBES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE SUPPORTING PETITIONER

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34 pp

QUESTION PRESENTED

Whether, when providing news-related programming to the communities they serve, broadcast stations licensed to state and local governmental entities are subject to First Amendment limitations inapplicable to private commercial broadcasters.

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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

The Federal Communications Commission (FCC) is the agency to which Congress has delegated the authority to regulate the broadcasting industry under the Communications Act of 1934. See 47 U.S.C. 151 *et seq.* Congress and the FCC have committed substantial public resources—in the form of frequency allocations and federal funds—to the development of noncommercial educational broadcasting (commonly referred to as "public broadcasting"). In so doing, Congress and the FCC have acted on the

premise that the employees of all public broadcasting stations, of which more than two-thirds are licensed to state entities, will exercise the same editorial discretion over the content of their programming as their counterparts in private commercial broadcasting. In holding that the First Amendment constrains the editorial decisions of a state-entity licensee, however, the court of appeals' decision in this case threatens the premise underlying the federal regulatory scheme. The Commission and the United States therefore have a substantial interest in the outcome of this case.

STATEMENT

1. a. Before passage of the Radio Act of 1927, ch. 169, 44 Stat. 1162, "the allocation of [broadcasting] frequencies was left entirely to the private sector, and the result was chaos." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375 (1969). Congress recognized that, unless the federal government regulated access to the airwaves, each speaker would be drowned out in a "cacophony of competing voices." *Id.* at 376. Congress thus enacted the Communications Act of 1934, ch. 652, 48 Stat. 1064, "to protect the public interest in communications," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), by formulating "a unified and comprehensive regulatory system for the industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress assigned enforcement responsibility under this new regulatory scheme to the FCC.

Broadcasters are granted station licenses for terms of up to eight years. Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, § 203, 110 Stat. 112 (to be codified at 47 U.S.C. 307(c)(1) (Supp. II 1996)). The Commission may grant and subsequently renew such licenses only after finding that doing so will serve "the public convenience, interest, or necessity." 47 U.S.C. 303, 307(a); see 1996 Act §§ 203, 204(a)(1), 110 Stat. 112-113 (to be codified at 47 U.S.C. 307(c)(1), 309(k) (Supp. II 1996)). The "policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

A central element of this regulatory scheme is the responsibility of the individual licensee, whether a governmental or private entity, to act as a public trustee. A broadcasting license is a public trust. The licensee obtains "the free and exclusive use of a limited and valuable part of the public domain" and, in return, assumes a duty to serve the public interest. See *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 997, 1003 (D.C. Cir. 1966). As one sponsor of a predecessor to the Communications Act observed 70 years ago, "the right of the public to service is superior to the right of any individual. * * * If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White); see also S. Rep. No. 562, 86th Cong., 1st Sess. 8 (1959) (amendments to Communications Act); *Red Lion*, 395 U.S. at 375-377; *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

The "ability of the licensee to render the best practicable service to [its] community" is crucial to the Commission's licensing decisions. *Sanders Bros.*, 309 U.S. at 475. Specifically, a broadcaster must

direct issue-responsive programming to the identified needs of its community. See *Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), reconsideration denied, 104 F.C.C.2d 358 (1986), aff'd in relevant part *sub nom. Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968, reconsideration granted in part, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Failure to meet that requirement can lead to the denial of a broadcaster's renewal application. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975).

Each licensee must itself undertake, and therefore may not delegate, the "primary duty and privilege to select the material to be broadcast to his audience." *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2311-2312 (1960); see also *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 599-600 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973). The FCC "has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee," *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967), and has expressed strong disapproval of any decision by a licensee to relinquish control over portions of its programming. See, *e.g.*, *Trustees of Univ. of Pennsylvania*, 69 F.C.C.2d 1394 (1978); *Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558, reconsideration denied, 61 F.C.C.2d 257 (1976), rev'd on other grounds, 581 F.2d 917 (D.C. Cir. 1978); *Carol Music, Inc.*, 37 F.C.C. 379, 380, 400 (1964); see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier") (to be recodified at 47 U.S.C. 153(10) (Supp. II 1996)).

b. A broadcaster must exercise the same editorial control over its political programming that it exer-

cises over all other forms of programming. The Communications Act draws an important distinction, however, between political programming and political advertisements, over which candidates, rather than broadcasters, exercise absolute editorial control. See generally *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The Act imposes a specific set of requirements on a broadcaster's sale (or contribution) of airtime to candidates for political advertising. Section 312(a)(7) gives all legally qualified federal candidates a limited right of "reasonable" access to the airwaves, and Section 315(a) provides that, if any legally qualified candidate for public office "use[s]" a broadcast station (by, for example, purchasing airtime for political advertisements), other candidates for the same office must be given an "equal opportunit[y]" to use that station as well. See 47 U.S.C. 312(a)(7), 315(a); see generally *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981); *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 422-424 (D.C. Cir. 1980); *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd 678, 680-686 (1991), reconsideration granted in part, 7 F.C.C. Rcd 4611 (1992).

A candidate's appearance in a broadcaster's news programming, however, is not a "use" by that candidate of the broadcaster's station. 47 U.S.C. 315(a). It is instead an intrinsic part of any broadcaster's journalistic efforts to inform the public about political developments. Accordingly, the Communications Act exempts news programming, including such "bona fide news events" as televised candidate debates, from any "equal opportunities" requirement that would grant rights of appearance or participation to excluded candidates. See 47 U.S.C. 315(a)(1)-(4); *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert.

denied, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), aff'd *sub nom. League of Women Voters Educ. Fund* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1984) (Table); see also *American Independent Party*, 62 F.C.C.2d 4, aff'd mem. *sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir. Oct. 21, 1976), cert. denied, 430 U.S. 955 (1977).

Moreover, a televised candidate debate is a "bona fide news event," and qualifies for the exemption from the equal-opportunities requirement, even if the debate is sponsored by the broadcaster itself. See *Henry Geller*, *supra*; see also *King Broadcasting Co.* v. *FCC*, 860 F.2d 465, 466-467 (D.C. Cir. 1988); *Fox Broadcasting Co.*, 11 F.C.C. Rcd 11,101 (1996). The Commission has indicated, however, that it will recognize that exemption only where a broadcaster's decision to exclude a candidate from a debate it has sponsored rests on a reasonably based, good-faith journalistic judgment about the most effective way to present the debate to the public, and not on a desire to promote or suppress the views of a particular candidate. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd at 684, 685 n.51; *Cyril E. Sagan*, 1 F.C.C. Rcd 10 (1986); *Brown for President Comm.*, 75 F.C.C.2d 609, 613-614 (1980); see also *Chisholm*, 538 F.2d at 358-360.

c. "The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." *FCC* v. *League of Women Voters*, 468 U.S. 364, 367 (1984); see also S.E. Frost, Jr., *Education's Own Stations* 464 (1937). Between 1921 and 1936, the federal government issued approximately 200 radio broadcast licenses to educational institutions, many of which were public. See *id.* at 2-5. When the FCC first reserved frequencies for

noncommercial educational (or "public") television use, it fully expected that many public broadcasting facilities would be licensed to, and financed by, state and local governmental entities. See *Television Assignments, Sixth Report and Order*, 41 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock).[1] Approximately two-thirds of public broadcasting stations are now licensed to governmental entities. See *League of Women Voters*, 468 U.S. at 393 n.22.[2]

With few exceptions, public broadcasters are subject to the same regulatory standards as commercial broadcasters, including the requirement that each licensee retain editorial control over the content of its

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[1] Since 1962, the federal government has provided substantial public funding for noncommercial educational broadcasting. See Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64; Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365; see also *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 292 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983).

[2] Today, noncommercial educational stations in general (including those licensed to private entities) account for 365 of the 1,555 television broadcast licenses in the United States; among the nation's 12,142 total radio stations, 1,871 are classified as noncommercial educational stations. See Federal Communications Comm'n, Mass Media Bureau, *Broadcast Station Totals* (May 9, 1997). Although governmental entities typically seek licenses to operate noncommercial educational stations, they may, and occasionally do, operate commercial stations as well. See, *e.g.*, *Iowa State Univ. Broadcasting Corp.*, 9 F.C.C. Rcd 481 (1993), aff'd *sub nom. Iowans for WOI-TV, Inc.* v. *FCC*, No. 94-1014, 1995 WL 116251 (D.C. Cir. Feb. 24, 1995) (50 F.3d 1096 (Table)); George N. Gordon, *Educational Television* 9 (1965).

programming.[3] In particular, the FCC has addressed, and has specifically rejected, the position that the editorial decisions of state-entity broadcast licensees are subject to greater legal constraints than the decisions of any other licensee. The Commission reasons that, because there is no constitutional right of access to a broadcast station, and because Congress refused to treat broadcasters as common carriers, state-entity licensees have both the same "public trustee" responsibilities and the same editorial discretion as private licensees. Accordingly, the Commission has concluded that the "public forum doctrine" is not applicable to, and the First Amendment does not restrict, a state-entity licensee's choice and selection of programming. See *Mississippi Auth. for Educ. Television*, 71 F.C.C.2d 1296, 1303 n.12 (1979); *City of New York Municipal Broadcasting Sys.*, 56 F.C.C.2d 169, 170 (1975).

2. This case concerns the constitutionality of a decision by the Arkansas Educational Television Network (AETN) to sponsor and broadcast a 1992 debate

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[3] See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 650-651 (1994); *League of Women Voters*, 468 U.S. at 367; *Muir*, 688 F.2d at 1040; *Accuracy in Media*, 521 F.2d at 291. The exceptions are a ban on supporting or opposing any candidate for office; a requirement that such broadcasters operate on a noncommercial, nonprofit basis; and a general prohibition against accepting payment for the broadcast of commercial or political advertisements. See 47 U.S.C. 399, 399b; 47 C.F.R. 73.621. Like all other licensees, however, public broadcasters are subject to the "reasonable access" and "equal opportunities" requirements of Sections 312(a)(7) and 315(a) of the Communications Act. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd at 681; *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1092-1094 (1978).

between the two leading candidates for a seat in the United States House of Representatives. Petitioner Arkansas Educational Television Commission (AETC), an Arkansas state agency, operates AETN.[4] Petitioner did not invite respondent Ralph P. Forbes, an independent candidate for the congressional seat at issue, to participate in the debate. That decision rested not on any disagreement with respondent's political viewpoint, but on his lack of public support, the absence of public interest in his candidacy, and his negligible chance of electoral success. See Pet. 2-3, 6, 14-15; Pet. App. 8a-9a.

Although candidates seeking airtime on any broadcast station may pursue various administrative remedies under Sections 312(a)(7) and 315(a) of the Communications Act by filing a complaint with the FCC, see pp. 5-6, *supra*, respondent filed no such complaint and instead sought relief directly in federal district court, asserting, among other things, a First Amendment right to participate in the debate. The district court dismissed the suit for failure to state a legally valid claim, and respondent unsuccessfully sought preliminary injunctive relief in the court of appeals. See Pet. App. 43a-44a.

Sitting en banc to hear respondent's appeal on the merits, however, the Eighth Circuit remanded the case to the district court for further proceedings. Pet. App. 25a-42a (*Forbes I*). It held that AETN is a state actor, that it "is faced with constraints not shared by other television stations," that respondent had "a qualified right of access created by [petitioner's] sponsorship of a debate," and that petitioner

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[4] We will refer to AETC and AETN collectively as "petitioner."

"must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Id.* at 33a-34a. The court suggested that whether or not petitioner's "reason" was "strong enough" turned on whether the debate should be characterized as a "nonpublic" or, alternatively, as a "limited public" forum, an issue that the court remanded to the district court. *Id.* at 34a-37a. This Court denied certiorari. 513 U.S. 995 (1994).

On remand, the district court found as a matter of law that the debate was a nonpublic forum. See Pet. App. 6a. The court also submitted to the jury special interrogatories asking whether the decision to exclude respondent from the debate was influenced by political pressure or disagreement with respondent's views. The jury answered those questions in the negative. See *id.* at 7a-9a. Based on those findings, the district court ruled for petitioner.

The court of appeals reversed. Pet. App. 1a-18a (*Forbes II*). The court accepted the jury's determination that the decision to exclude respondent from the debate was viewpoint-neutral and free of influence from political pressure. See *id.* at 7a-9a. Indeed, it specifically found that the decision to exclude petitioner "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nonetheless, although the court acknowledged (*id.* at 15a) that petitioner had never intended to open the debate to all legally qualified candidates, it held that the debate was a "limited public forum" and that petitioner was without authority to exclude peripheral candidates: "Whether [respondent] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government

in charge of channels of communication." *Id.* at 16a.[5] Finding that petitioner's reason for excluding respondent from the debate was "neither compelling nor narrowly tailored"—the standard of review that the court deemed applicable to speech restrictions in limited public forums—the court reversed and remanded for an assessment of damages. *Id.* at 17a-18a.

On September 25, 1996, Justice Thomas denied petitioner's application to stay enforcement of the Eighth Circuit's decision pending the filing of a petition for certiorari. See Pet. 8. On September 26, 1996, the Eighth Circuit, in denying petitioner's motion to stay its mandate, issued a one-paragraph clarification of its earlier decision. Pet. App. 19a. The court stated that petitioner remains free, "to the extent provided by law," to cover "bona fide news events," including candidate debates, that are "organized by people or groups other than [petitioner]." *Ibid.* The court added that its earlier decision did not necessarily require petitioner to invite write-in candidates to participate in any debate that it sponsored. *Ibid.*

SUMMARY OF ARGUMENT

In sponsoring a televised candidate debate, any broadcaster, whether public or private, makes numerous, interrelated editorial judgments concerning the debate's format, content, purpose, and participants. The product of those judgments is an expressive news program designed to satisfy the broadcaster's statu-

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[5] In so holding, the court noted (Pet. App. 37a n.4) that its decision conflicted with a decision reached by the Eleventh Circuit on essentially indistinguishable facts. See *Chandler* v. *Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (1990), cert. denied, 502 U.S. 816 (1991); see also *Muir*, *supra*.

tory duty to exercise its own journalistic discretion to inform its viewers on matters of public interest. Sponsorship by a state actor does not convert that news program into a "public forum" to which private individuals have a constitutional right of access. Instead, televised debates and other news programs sponsored by state-entity broadcasters, like academic lecture series sponsored by state universities, are informative, focused presentations that, as a general matter, a state actor may constitutionally create, structure, and invest with such content as it deems appropriate. See generally *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2519 (1995); *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981).

Indeed, subjecting the editorial discretion of state-entity broadcasters to case-by-case constitutional scrutiny would disserve "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 392 (1969). Compelling state-entity broadcasters to invite every legally qualified candidate to any debate that they sponsor, or even exposing those broadcasters to a threat of constitutional litigation for excluding particular candidates, could discourage many such broadcasters from sponsoring political debates at all. Moreover, there is no obvious limiting principle that would afford minor candidates a constitutional "right of access" to televised debates but not, for example, to evening news broadcasts featuring interviews with the major candidates. Indeed, carried to its logical conclusion, the court of appeals' reasoning—that "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a)—could bar state-entity broadcasters from structuring weekly panel

discussions to include certain outside commentators but not others who might also wish to participate.

Because broadcast journalism often requires difficult judgments about the range of differing viewpoints that can be feasibly and usefully presented on any given topic, application of "forum" analysis to the editorial decisions of state-entity broadcasters could imperil the ability of those broadcasters to air many kinds of news programming. Nonetheless, even if that analysis were applicable, which it is not, and even if (as the court of appeals believed) the debate at issue here could properly be characterized as a limited public forum, petitioner's decision to exclude respondent would be constitutional. Petitioner's decision to exclude non-major candidates from the debate was both viewpoint-neutral and reasonably calculated to preserve the character of the debate as an efficient means for community viewers to learn the positions of the principal candidates. That showing is enough to justify regulation of speech in either a limited public forum or a nonpublic forum. See *Rosenberger*, 115 S. Ct. at 2517.

ARGUMENT

The court of appeals held that a state-entity public broadcaster, when sponsoring a political debate for the benefit of the viewers in its community, may not limit the participants to the principal candidates, but must also invite every "legally qualified" candidate—no matter how peripheral—for the elective office at issue. That decision was incorrect and should be reversed.

I. THE FIRST AMENDMENT DOES NOT CONSTRAIN THE EDITORIAL CHOICES OF STATE-ENTITY PUBLIC BROADCASTERS LICENSED TO OPERATE UNDER THE COMMUNICATIONS ACT

a. "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). Instead, Congress relied on the diverse editorial decisions of individual broadcasters, combined with each broadcaster's statutory duty to serve the needs of its viewing community, to ensure a rich marketplace of ideas in television broadcasting. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." *CBS, Inc.*, 412 U.S. at 124-125.

That judgment is no less applicable to state-entity broadcasters than to any other broadcaster. See *League of Women Voters*, 468 U.S. at 392 n.21, 397-399; see also *CBS, Inc.*, 412 U.S. at 121-132 ("assuming [that] governmental action" inheres in the actions of commercial broadcasters in their role as public trustees, an issue on which the Court reached no majority, the First Amendment nonetheless creates no "right-of-access" to broadcast stations for purchase of editorial advertising). The Communications Act and the FCC's detailed regulatory scheme require every broadcaster, whether public or private, to

use its own editorial discretion to serve the public interest, and no broadcaster may cede that responsibility to members of the general public. See pp. 4-5, *supra*; *CBS, Inc.*, 412 U.S. at 108-114; see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier") (to be recodified at 47 U.S.C. 153(10) (Supp. II 1996)); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

A state-entity broadcaster's responsibility to exercise editorial control and judgment over the content of its programming is therefore inconsistent with any characterization of those broadcasters, or of the programs each such broadcaster airs, as "public forums." A structured debate between the two major candidates for a given political office, sponsored and aired by a state-entity licensee, is a news program designed to meet the viewing needs of the licensee's broadcast community. See pp. 5-6, *supra*. A news program is more likely to meet those needs if, as Congress intended, the sponsoring broadcaster may exercise its journalistic discretion to exclude material that would detract from the program's overall effectiveness. Such programs are not, and should not be equated with, government property opened up for untrammeled expression by a broad variety of individual speakers, cf. *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), and they therefore do not create a right of access to every peripheral candidate who wishes to appear on television.

b. The court of appeals erred not simply in characterizing a state-entity licensee's news programming

as a "limited public forum," but also, more fundamentally, in employing "forum" analysis at all to resolve this case. As discussed in point II below, this Court has relied upon that analysis to determine the proper level of First Amendment scrutiny applicable to restrictions on private speech that, while delivered on (or by means of) public property, is not itself part of a state actor's own expressive presentation to the public. See generally *Rosenberger*, 115 S. Ct. at 2518-2519; *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). In that context, even when the public property at issue is characterized as a "nonpublic" forum, a speech regulation may be subject to significant First Amendment constraints (such as a viewpoint-neutrality requirement). See, *e.g.*, *Perry Educ. Ass'n*, 460 U.S. at 46.

But "forum" analysis is altogether inapplicable where, as here, a state actor[6] creates, and exercises

[6] Petitioner "is an agency of the State of Arkansas," Pet. 2, and is therefore "part of the Government for purposes of the First Amendment." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); cf. *West* v. *Atkins*, 487 U.S. 42, 50-51 (1988); *Polk County* v. *Dodson*, 454 U.S. 312, 320-322 (1981). Nonetheless, federal law insulates the editorial decisions of state-entity broadcasters from political influence by the federal government, see *League of Women Voters*, 468 U.S. at 389-390, 394, and the Communications Act imposes on such broadcasters the same obligation to serve the public interest as it imposes on other licensees. Moreover, petitioner's organizational structure and operating principles serve to protect its editorial decisions from influence by state or local government officials. See J.A. 110-112, 195-197; see also Pet. App. 7a-8a (accepting jury's finding that the decision to exclude respondent from the debate was not "influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network"). Although such influence on a broadcaster (whether or not it is a state entity) might impair the broadcaster's performance of its statutory obligations under the Communications Act, it would not, in our view, change the analysis under the First Amendment.

continuing editorial control over, a structured news or educational program designed to edify the public on discrete topics. Cf. *Rosenberger*, 115 S. Ct. at 2519. In that setting, among others, the state actor may take the same reasonable measures a private party might pursue in analogous circumstances to ensure that its program is "neither garbled nor distorted." *Ibid.*; cf. *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992) (distinguishing, for First Amendment purposes, between government "as lawmaker" and government "as a proprietor"); *United States* v. *Kokinda*, 497 U.S. 720, 725-726 (1990) (plurality opinion) (similar); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303-304 (1974) (plurality opinion) (similar).

That conclusion follows from the more general principle that, "when the State is the speaker, it may make content-based choices." *Rosenberger*, 115 S. Ct. at 2518 (citing, *inter alia*, *Widmar*, 454 U.S. at 276, and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)); see also *id.* at 2548 n.11 (Souter, J., dissenting). Of course, a televised candidate debate contains much speech that is not itself the speech of the sponsoring broadcaster and cannot be attributed to the broadcaster: during the course of the debate, the candidates give their own answers to the questions they are asked. Nonetheless, the program itself—much like televised weekly panel discussions featuring the views of designated outside commentators—is the expressive product of a

series of interrelated journalistic judgments by the broadcaster about format, purpose, the topics to be addressed, and the participants to be invited. Those judgments, and the news programs that they shape, are no more subject to First Amendment challenge than would be the direct expression of a government spokesperson's views on a matter of public importance. See generally *Block* v. *Meese*, 793 F.2d 1303, 1312-1314 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986). By analogy, when private actors sponsor candidate debates (or televised weekly panel discussions), their editorial choice of program form and content is at least as expressive in character, and at least as close to the core of the First Amendment's concern for journalistic freedom, as a cable operator's selection of programming channels for carriage, which the Constitution protects. See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 636-641 (1994); see also *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2386-2388 (1996) (plurality opinion); *id.* at 2423-2425 (opinion of Thomas, J.); see generally *Rosenberger*, 115 S. Ct. at 2548 n.11 (Souter, J., dissenting).

Outside the broadcasting context as well, the First Amendment permits a state actor, *inter alia*, to structure a focused presentation for a discrete public purpose by selecting some private individuals, but not others, to participate in the presentation by giving their own disparate views on given subjects. For example, in sponsoring a lecture series, a state university may invite outside speakers to give a diversity of opinions on a topic without thereby bestowing on individuals with additional (or contrary) opinions a constitutional right of access to the podium. See *Widmar*, 454 U.S. at 276-277; see also

Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260, 267-273 (1988); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967) (denying claim of First Amendment right to publish article in law review issued by state university), cert. denied, 390 U.S. 920 (1968). Similarly, in structuring a ceremony to commemorate the anniversary of a historical event, the federal government may select private speakers to give a range of viewpoints on that event—which may or may not coincide with any official government position—without thereby incurring an obligation to ensure that all available viewpoints are represented. And the government may select certain individuals to create a public mural or monument that reflects some, but not all, views on a topic such as the Holocaust. Cf. *Piarowski* v. *Illinois Community College*, 759 F.2d 625, 631-632 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

The principal legal constraints on the news programming of a state-entity broadcaster therefore derive not from the First Amendment, but from the Communications Act, which directs all broadcasters, public and private, to exercise reasonable editorial discretion in serving the public interest. See *CBS, Inc.*, 412 U.S. at 124-125. And, as interpreted by the Commission, the Act also provides, in some circumstances, administrative remedies to candidates who can show that a broadcaster's news coverage is so arbitrarily neglectful of or hostile to their candidacies that it does not constitute a reasonably based, good-faith exercise of journalistic judgment.[7]

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[7] See pp. 5-6, *supra*. In his amended complaint, respondent noted the "equal opportunities" provision of 47 U.S.C. 315(a), see J.A. 27, but he did not squarely contend that Section 315(a) entitled him to participation in the debate, see *ibid.*;

But the First Amendment provides no basis for subjecting the editorial discretion of state-entity licensees and programming networks to greater scrutiny than the discretion of their counterparts in private commercial broadcasting.

The court of appeals' decision appears to rest, at least in part, on the concern that, in the absence of First Amendment constraints, a state-entity broadcaster might arbitrarily discriminate against "all Republicans" or "all Methodists" in its choice of debate participants. Pet. App. 34a; see also *id.* at 4a (permitting state-entity licensee to exclude non-major candidates from debate would "place too much faith in government"). That concern is misguided. As an initial matter, such discrimination would subject any broadcaster, public or private, to administrative measures under the Communications Act. See pp. 5-6, *supra*; see also note 3, *supra*. Even in the absence of those statutory protections, however, the actions of a state-entity broadcaster, like all actions of any state actor, "must be sufficiently reasonable to satisfy the Due Process Clause and cannot unfairly discriminate in violation of the Equal

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instead, he appeared to argue only that Section 315(a) entitled him to airtime on petitioner's stations for other purposes (such as airing an anti-abortion advertisement). See Pet. App. 31a. In any event, the court of appeals correctly denied his claim under Section 315(a) because he had failed to exhaust his administrative remedies before the FCC. *Ibid.* As discussed above (see p. 5, *supra*), Section 312(a)(7) of the Communications Act independently requires broadcasters to sell or donate airtime for use by federal political candidates. See 47 U.S.C. 312(a)(7); *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981). Respondent has raised no claim under that provision, which in any event has no relevance to a broadcaster's choice of political *programming*.

Protection Clause." *Southeastern Promotions*, 420 U.S. at 572 n.2 (Rehnquist, J., dissenting). Invidious discrimination against "all Republicans" or some other group, detached from any legitimate journalistic purpose, would lack a rational basis and would be constitutionally invalid on that ground alone. Cf. *ibid.* (even in absence of First Amendment constraints, "[a] municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment").

c. Not only do First Amendment principles give private individuals no right to appear on public television, but they in fact counsel strongly against recognizing any such right. As this Court has held, the "First Amendment goal of producing an informed public capable of conducting its own affairs," *Red Lion*, 395 U.S. at 392, is better served not by granting private individuals rights of access to the airwaves, but by respecting the "journalistic discretion of broadcasters in the coverage of public issues." *CBS, Inc.*, 412 U.S. at 124; see also *League of Women Voters*, 468 U.S. at 398.

State-entity broadcasters and programming networks may effectively exercise that discretion only if they, like all other broadcasters and programmers, are permitted to structure their news programming without fear that aggrieved parties will sue to challenge the details of that programming as the products of unconstitutional editorial criteria. Cf. *CBS, Inc.*, 412 U.S. at 127 (rejecting "right-of-access" interpretation of Communications Act that would require "a continuing case-by-case determination of who should be heard and when"). Journalism inevitably requires difficult judgments about content, and no journalist

can cover all viewpoints on all topics. Subjecting the editorial decisions of public broadcasters to case-by-case scrutiny for content- or viewpoint-neutrality under "forum" analysis, see *Rosenberger*, 115 S. Ct. at 2517, could seriously discourage such broadcasters from providing full coverage of political contests.

Carried to its logical conclusion, the court of appeals' contrary approach would invite constitutional litigation concerning not just political debates aired by state-entity licensees and programming networks, but also a broad range of other news programming that has traditionally fallen within every broadcaster's editorial discretion. For example, any state-entity broadcaster or programming network that airs an interview with a political candidate as part of its nightly news coverage could arguably be required, under the Eighth Circuit's reasoning, to air a separate interview of every rival candidate who seeks equal public exposure.[8] Moreover, the Eighth

[8] While the petition for certiorari in this case was pending, the Eighth Circuit agreed to en banc consideration of whether a state-entity licensee may sponsor and air news programs featuring interviews with the "major candidates" for political office. See *Marcus* v. *Iowa Pub. Television*, No. 96-3645SIDM (Dec. 10, 1996). A divided panel of the Eighth Circuit had earlier denied preliminary injunctive relief to non-major candidates who sought to appear on those programs; it reasoned that, even if the programs at issue are limited public forums, the state-entity licensee likely has a "compelling interest" in "limiting access to newsworthy candidates." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1144 (1996). In analysis that a dissenting judge characterized as an effort "to distinguish the indistinguishable," *ibid.* (Beam, J., dissenting), the panel majority explained its tentative departure from the decision in this case on the ground that, "[u]nlike 'viability,' which is ultimately for the voters to decide, 'newsworthiness' is peculiarly a

Circuit's reasoning would also seem to grant rights of television access not just to uninvited candidates, but to anyone with a view about a matter of public controversy. If, as the court of appeals believed, "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a), then, arguably, anyone could demand airtime to respond to the views expressed by anyone else interviewed in a news program, or featured in a panel discussion, sponsored by a state-entity licensee or programming network.

Even if confined to the context of candidate debates, however, the court of appeals' approach would harm public awareness of, and discussion about, political contests throughout the United States. The value of a debate does not necessarily increase with the number of participants; as common sense suggests, the inclusion of too many participants could make almost any debate unwieldy and uninformative. As a practical matter, the Eighth Circuit's approach could well lead many state-entity broadcasters simply to abandon plans to sponsor candidate debates. For example (see Pet. 11), the Nebraska Educational Telecommunications Network canceled a 1996 senatorial debate because it feared that, under the decision below, it would have to invite all minor candidates who wished to appear alongside the major contenders. Such consequences are unfortunate: not just for state-entity licensees themselves, but, more significantly, for the innumerable American citizens who

decision within the domain of journalists." *Id.* at 1142. On March 24, 1997, the Eighth Circuit deferred further consideration of *Marcus* until after this Court's final disposition of this case.

rely on such licensees to sponsor televised debates among the principal candidates for federal, state, and local offices.

II. EVEN IF "FORUM" ANALYSIS WERE APPLICABLE TO THE EDITORIAL DECISIONS OF STATE-ENTITY BROADCASTERS, PETITIONER'S REASONABLE, VIEWPOINT-NEUTRAL CHOICE OF DEBATE PARTICIPANTS STILL WOULD HAVE BEEN CONSTITUTIONAL

As a general matter, "forum" analysis imposes constitutional constraints on government regulation of private expression on (or by means of) public property that the government does not itself seek to use as the site or medium of its own expressive presentation to the public. See generally *Perry Educ. Ass'n*, 460 U.S. at 45-46. The most basic distinction drawn in this area is between "traditional" public forums, in which the government may not regulate on the basis of speech content without a compelling state interest, and "nonpublic forum[s]," in which speech "can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

Similar to "nonpublic" forums are forums "limited" to certain subjects or groups; there too, non-viewpoint-based "content discrimination * * * may be permissible if it preserves the purposes of th[e] limited forum." *Rosenberger*, 115 S. Ct. at 2517; see also *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. "Limited" public forums are a subset of "designated" public forums, and should be distinguished from other

kinds of designated forums that are not so limited, such as historically closed government property that the government has "generally open[ed] to the public" as "a place for expressive activity" of all kinds. *Id.* at 45. Speech restrictions in that latter category of "designated" public forum, unlike speech restrictions in forums "limited" to certain topics or groups, are generally subject to the same strict content-neutrality requirement applicable to truly traditional public forums such as streets and sidewalks. See *id.* at 45-46 & n.7; *Cornelius*, 473 U.S. at 802; cf. *Denver Area*, 116 S. Ct. at 2388-2389 (plurality opinion); *id.* at 2413-2414 (opinion of Kennedy, J.).

Because the First Amendment has no application to the editorial choices that define a state-entity broadcaster's news programming, this case can and should be decided without reference to "forum" analysis. That analysis, as we have observed (see p. 16, *supra*), is applicable only where the government passively permits the use of its property to "encourage a diversity" of private views, see *Rosenberger*, 115 S. Ct. at 2519; but it is inapplicable in (for example) the circumstances presented here, in which a state actor designates private speakers to participate in a focused presentation that the state actor itself has designed for a discrete public purpose and over which it exercises close editorial control.

Nonetheless, even if "forum" analysis were applicable in this context, which it is not, then—whether this candidate debate is properly characterized as a "limited public" or as a "nonpublic" forum—petitioner's choice of debate participants still would have been constitutional. The court of appeals not only acknowledged that petitioner's decision to exclude respondent from the debate was "exactly the kind of

journalistic judgment routinely made by newspeople," Pet. App. 16a, but further accepted the jury's determination that petitioner's decision was not influenced by political pressure and was not "based on disagreement with [respondent's] political viewpoint," *id.* at 9a.

Thus, under the facts embraced by the court of appeals, petitioner's choice of participants was viewpoint-neutral (and arguably content-neutral as well) and reasonably calculated to preserve the character of the debate. Petitioner created the debate as an efficient means for community viewers to learn more about the candidates who, with the election drawing near, had attracted significant public interest or support; and to that original and entirely legitimate purpose petitioner remained faithful. See generally *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976) (per curiam) ("Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support.") (citation omitted); see also *Denver Area*, 116 S. Ct. at 2414 (opinion of Kennedy, J.). A state actor need show no more to justify speech regulations designed "to preserve the limits of the forum it has created." *Rosenberger*, 115 S. Ct. at 2517 (speech restrictions in limited public forum must be viewpoint-neutral and "reasonable in light of the purpose served by the forum"); *id.* at 2547-2549 (Souter, J., dissenting); accord *Perry Educ. Ass'n*, 460 U.S. at 46 & n.7;

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 96-779

IN THE

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OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, CORPORATION FOR PUBLIC BROADCASTING, PUBLIC BROADCASTING SERVICE, AND ORGANIZATION OF STATE BROADCASTING EXECUTIVES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a state-affiliated public broadcast licensee's nonpartisan decision to host a debate between newsworthy congressional candidates creates a First Amendment right of access by all legally qualified candidates under the public forum doctrine.

2. Whether the good faith exercise of editorial discretion by a state-affiliated public broadcast licensee, protected by the Communications Act of 1934, as amended, enables the licensee to host a debate between only newsworthy candidates, even if the debate is found to be a limited public forum.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amici the Association of America's Public Television Stations ("APTS"), the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), and the Organization of State Broadcasting Executives ("OSBE")

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

collectively provide representation, programming, program distribution, related services, and financial support to the Nation's public television and radio stations -- two thirds of which, like the petitioner in this case, are licensed to state or local government entities or state universities.[2]

APTS and PBS are nonprofit membership organizations whose members collectively include 175 licensees representing approximately 350 public television stations in all 50 states. OSBE is a membership organization composed of the chief executives of television and radio stations licensed to state and local government entities. CPB is a nonprofit corporation authorized by the Public Broadcasting Act of 1967, 47 U.S.C. §§ 390-399, to allocate federal funds to promote public television and radio broadcasting in the United States. *Id.* § 396.

As discussed more fully below, the state-owned broadcast stations that amici represent and support are substantially and adversely affected by the Eighth Circuit ruling. The lower court decision sharply limits public broadcasters' ability to sponsor candidate debates that, in the broadcasters' good faith editorial judgment, will best serve the public interest. If affirmed, the decision could have a devastating effect on public broadcasters' coverage of federal, state, and local elections throughout the country.

This brief is filed with the consent of the parties. Consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from the Eighth Circuit Court of Appeals' holding that a debate between the Republican and Democratic candidates for an Arkansas congressional seat sponsored by the Arkansas Educational Television Commission ("AETC") to be aired on the Arkansas Educational Television Network ("AETN")[3] was a limited public forum for First Amendment

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[2] Not all noncommercial broadcast stations are licensed to governmental bodies, but for purposes of reference herein, such stations generally will be labeled public broadcast stations.

[3] AETN is the public television network of the State of Arkansas. It is governed by AETC, an agency of the State of Arkansas. For

purposes. The lower court held that the First Amendment prohibited AETN from excluding perennial candidate Ralph P. Forbes from the televised debate based on the station's good faith editorial judgment that -- in light of a number of factors, including Forbes' lack of public support and prior press coverage and the very low likelihood that he would win the election -- its viewers' interests would best be served by a debate between the two leading, major-party candidates.[4]

Under Arkansas law, a candidate needs only 2,000 petition signatures to secure a place on the congressional ballot. Ark. Code Ann. § 7-7-103(c)(1). It is undisputed in this case that, although Forbes attained ballot status, he had no other indicia of voter interest. J.A. 91-97, 106-107. At trial, the jury found in response to special interrogatories that AETN's decision not to include Forbes in the debate did not result from political pressure and was not motivated by disagreement with Forbes' views. Pet. App. 4a, 22a-23a.

Even the court of appeals agreed that AETN's judgment "was made in good faith" and involved "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nevertheless, the court characterized the exclusion of any candidate who attains ballot status as a bureaucratic "ipse dixit" and held that each legally qualified candidate has a First

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convenience, this brief refers to actions of both AETC and AETN as actions of AETN.

[4] Between 1985 and 1992, Forbes ran unsuccessfully for the U.S. Senate, the House of Representatives, Lieutenant Governor of Arkansas (twice) and a local school board. J.A. 199; Tr. 144-146. The Executive Director of AETN, who was ultimately responsible for the decision not to include Forbes in the debate, J.A. 108, testified that among the factors that influenced her were that Forbes had no campaign headquarters other than his own house; he had no paid campaign staff; he had little financial support, as evidenced by his failure to report his campaign finances to appropriate authorities; election night reporting services did not even plan to run his name in their results; and he was currently receiving little if any news coverage. *Id.* at 126-127.

"J.A." refers to the Joint Appendix filed in this Court. "Tr." refers to the trial transcript. "Pet. App." refers to the appendix filed with the Petition for Writ of Certiorari.

Amendment right to compel access to debates on public broadcast stations, *id.* at 15a -- regardless of how little public interest some candidacies have generated, or how the resulting cacophony of voices will distract from the issues that are important to most voters. In fact, the court implicitly held that all candidates on the ballot must be allowed to debate even if there are so many such candidates that a debate cannot realistically be held.

SUMMARY OF ARGUMENT

The Eighth Circuit holding that a public broadcaster-sponsored candidate debate constitutes a limited public forum is plainly wrong. Under this Court's precedents, the government creates a limited public forum only when it intentionally opens a forum for unrestricted expression by the public or some segment of the public. Broadcasters' facilities and their programs clearly do not meet this standard, as every other court of appeals to address the issue has held.

Broadcasters -- both public and private -- are statutorily required to serve the public interest and are authorized to make journalistic judgments in determining the content of their programs. When a broadcast station makes a good faith decision to invite those candidates who are most newsworthy to appear in a debate, it is exercising that journalistic discretion and not providing an "open microphone" for all candidates.

The Eighth Circuit's contrary conclusion contravenes twenty years of Federal Communications Commission and judicial precedent under the Communications Act holding that broadcaster-sponsored debates are "bona fide news events" and permitting broadcasters to determine what debate format will best serve the public interest in a particular case. The lower court holding, if affirmed, will sharply restrict public broadcasters' ability to sponsor candidate debates and provide other campaign news coverage. It effectively destroys the ability of public broadcasters -- and indeed all government-owned publishers -- to make necessary editorial choices.

Even if candidate debates are labeled limited public forums, moreover, this Court's precedents require that their constitutionality be measured against both the legal

framework in which broadcasters operate and the function that televised debates are intended to serve. Properly viewed in this context, the debate at issue here was clearly permissible.

This Court has long recognized that the government may "speak" in many ways, including by subsidizing the speech of others -- for example, by providing funding for political candidates. When it does so, it is not required to fund every candidate, so long as its choices are not viewpoint discriminatory. The legitimacy of the government's selection of voices depends upon the particular context in which it is made. When, as here, a public broadcaster with a statutory obligation to serve the public interest makes a good faith editorial decision to present a debate between the candidates who are of interest to most viewers, that decision is clearly appropriate and should be upheld.

ARGUMENT

I. A CANDIDATE DEBATE SPONSORED BY A PUBLIC TELEVISION STATION IS NOT A LIMITED PUBLIC FORUM FOR FIRST AMENDMENT PURPOSES

AETN made a journalistic decision to sponsor a debate between the two major candidates for Arkansas' third district congressional seat. The court of appeals nonetheless concluded that the debate "was surely a place opened by the government for a limited class of speakers," which it found included *all* "candidates running for the Third District Congressional seat." Pet. App. 15a. That conclusion has no basis in this Court's First Amendment jurisprudence, is inconsistent with the FCC's longstanding treatment of televised debates under the equal opportunities provision of the Communications Act, and will sharply limit public broadcasters' ability to host debates and to exercise the editorial discretion that is vital to their missions.

A. A Broadcaster's Decision To Sponsor A Debate Between Selected Candidates For Office Does Not Evince An Intent To Create An Open Forum For All Candidates To Express Their Views

The Eighth Circuit's public forum determination rests on two fundamental errors.

First, the court emphasized that AETN is "governmentally owned" and that the selection of debate participants was made by government employees. Pet. App. 5a, 16a. Under this Court's precedents, however, AETN's public nature plainly does not make it, or its programming, a public forum. This Court repeatedly has held that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 115 S. Ct. 2440, 2446 (1995). Nothing in the First Amendment compels "'access to property simply because it is owned or controlled by the government.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (quoting *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981)). *Accord Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 301-302 (1974) (plurality opinion).

This Court recently confirmed that government ownership or control of a channel of communication is not dispositive of the public forum question. In *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Court held that a government-controlled corporation is a state actor for purposes of First Amendment analysis. It compared Amtrak to the Corporation for Public Broadcasting, noting that the boards of directors of both entities are "controlled by Government appointees." *Id.* at 970. Nevertheless, control of the enterprise by government appointees was not "crucial," as the Eighth Circuit erroneously held, Pet. App. 16a, for in *Lebron* the Court expressed no opinion as to whether a public forum had been created. 115 S. Ct. at 975.[5]

[5] On remand, the Second Circuit held that the particular billboard at issue was a non-forum. *Lebron* v. *National R.R. Passenger Corp.*, 69 F.3d 650, *amended*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

Second, the Eighth Circuit emphasized that a televised debate is designed to "'provid[e] a forum for expressive activity.'" Pet. App. 15a (quoting *Cornelius*, 473 U.S. at 805). But this Court's cases make clear that mere creation of a channel of communication does not make a public forum. As with the billboard space at issue in *Lebron*, some property controlled by the Government may have no other purpose than the communication of ideas, *Lebron*, 69 F.3d at 653-654, but "[t]he mere physical characteristics of the property cannot dictate forum analysis." *United States* v. *Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion). If they did, as this Court has observed, "'display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician.'" *Id.* at 726 (quoting *Lehman*, 418 U.S. at 304). *See also Perry*, 460 U.S. at 49 n.9; *Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6 (although bulletin board in military cafeteria "is specifically used for the communication of information and ideas, * * * such a bulletin board is no more a public forum than are the street corners and parking lots found not to be so at the same military base" (citing *Greer* v. *Spock*, 424 U.S. 828 (1976) (internal quotation marks omitted)).

The current position of the court below is not -- and has never been -- the law. "Not every instrumentality used for communication * * * is a traditional public forum or a public forum by designation." *Cornelius*, 473 U.S. at 803. Consequently, this Court has declined to accord forum status to advertising space on buses, *Lehman*, 418 U.S. at 301-302; mail boxes, *Greenburgh Civic Ass'ns*, 453 U.S. at 128-129; sidewalks adjacent to a post office, *Kokinda*, 497 U.S. at 730; high school student newspapers, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267-270 (1988); charitable campaign drives in federal offices, *Cornelius*, 473 U.S. at 803; and internal school mail systems, *Perry*, 460 U.S. at 49 n.9, even though all are avenues of communication controlled by the government, either by function or tradition. Most recently, this Court declined to hold that leased and public access channels on cable television systems are governed by

the public forum doctrine, even though such channels clearly involve expressive activity. *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2385, 2388-89 (1996) (plurality opinion).

The relevant question in identifying a limited public forum is not whether the forum is a medium of communication or is government controlled. Rather, the question is whether the government has shown a "'clear intent to create a public forum.'" *Hazelwood*, 484 U.S. at 270 (quoting *Cornelius*, 473 U.S. at 802). The government does not create a limited public forum "by inaction or by permitting limited discourse." *Cornelius*, 473 U.S. at 802. *Accord Perry*, 460 U.S. at 46-47. That selective groups or individuals are permitted to use public property, moreover, "does not transform [it] into a public forum." *Id.* at 47. *Accord Cornelius*, 473 U.S. at 805. Instead, the government must have, "'by policy or by practice,'" intentionally opened the forum "'for indiscriminate use by the general public, or by some segment of the public.'" *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 47).

This Court has identified a variety of factors that reflect the government's intention in this regard, including its practice or policy of allowing or disallowing unrestricted speech in the forum, the characteristics of the property, and, importantly, the government's stated purpose. *Cornelius*, 473 U.S. at 802-806. Analysis of the government's intent also depends on the role it is performing in a particular case. Where, as here, the government acts "as a proprietor, managing its internal operations," rather than "as [a] lawmaker with the power to regulate or license," its actions are subject to lesser scrutiny. *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). *Accord Kokinda*, 497 U.S. at 725 (citing *Cafeteria & Restaurant Workers, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961)). In such cases, the Court has repeatedly found that a limited public forum has not been created. *See, e.g., Lehman*, 418 U.S. at 303-304; *Perry*, 460 U.S. at 47. *See also Lebron*, 69 F.3d at 657.

In light of these settled standards, it is obvious that a broadcast station's decision to invite certain candidates to participate in a televised debate does not open a limited public forum in which all candidates must be invited to express their views. Broadcast stations are not common carriers,

traditionally open to all speakers. *See* 47 U.S.C. § 153(10) (providing that broadcast stations are not to be deemed common carriers). *See also Denver Area*, 116 S. Ct. at 2383 (distinguishing television broadcasters, which act "like editors," from common carriers such as telephone companies); *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984) (same). Rather, unlike common carriers, broadcasters are licensed by the FCC to exercise "'the widest journalistic freedom consistent with [their] public [duties].'" *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973) (*"CBS* v. *DNC"*)).

For this reason, every other court of appeals that has addressed the issue -- including the Eighth Circuit, prior to this case -- has correctly concluded that public television stations and their programs are not public forums under the First Amendment. As the full Fifth Circuit reasoned in *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1042 (5th Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1023 (1983), "[t]he pattern of usual activity for public television stations is the statutorily mandated practice of the broadcast licensee exercising sole programming authority." Because the public is not given general access to the station, the facility "by definition is not a 'public forum'" and an excluded speaker "is without grounds for challenge under the public forum doctrine." *Id.* at 1043.

Likewise, a broadcaster-sponsored debate is not a limited public forum because the decision to host a debate stems from the broadcaster's journalistic function and not from a desire to provide an "open microphone" for a hypothetical class of beneficiaries. As the Eleventh Circuit concluded in *Chandler* v. *Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 502 U.S. 816 (1991), on facts virtually indistinguishable from those in the present case, the Georgia Public Telecommunications Commission did not intend to open a forum for all candidates when it sponsored debates between the Republican and Democratic candidates for the offices of Governor and Lieutenant Governor. Rather, the public broadcasting commission was performing its function of "'providing educational, instructional, and public

broadcasting services to the citizens of the State of Georgia.'" *Id.* at 488 (quoting Ga. Code Ann. § 20-13-5(a)).

Public broadcaster-sponsored debates thus are not comparable, as the Eighth Circuit erroneously held, Pet. App. 13a, to municipal auditoriums, which may -- or may not -- be opened as designated forums for the unfiltered speech of various speakers. *Compare Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (auditorium was dedicated for expressive activities), *with Calash* v. *City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir. 1986) (limited access by selected groups does not make municipal auditorium a limited public forum). Nor are they comparable, as the court below suggested, Pet. App. 13a-14a, to university meeting facilities or subsidy programs made broadly available to student groups for their unrestricted expression and association. *See Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Healy* v. *James*, 408 U.S. 169 (1972). As the Eighth Circuit previously concluded, the nature and purpose of a public broadcaster-sponsored debate simply is "'not compatible with unrestricted public access, or even with unrestricted access by a particular class of speakers,'" and therefore cannot be deemed a limited public forum. *DeYoung* v. *Patten*, 898 F.2d 628, 633 (8th Cir. 1990) (quoting *Estiverne* v. *Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989)), *overruled by Forbes* v. *Arkansas Educ. Television Communications Network Found.*, 22 F.3d 1423 (8th Cir. 1994) (en banc).[6]

Under this Court's precedents, the reasoning of *Muir*, *Chandler*, and *DeYoung* is clearly correct. When a public television station stages a debate including only those candidates whose participation, in the station's good faith editorial judgment, will be most valuable to viewers, the station obviously does not intentionally open a forum "'for indiscriminate use'" by every legally qualified candidate, or by any other "'segment of the public.'" *Hazelwood*, 484 U.S. at 267 (quoting *Perry*, 460 U.S. at 46 n.7, 47). In this case, the record clearly demonstrates that AETN did not intend to

[6] *DeYoung* was overruled at an earlier stage of this litigation. Pet. App. 44a.

"open[] its facilities" to all "candidates running for the Third District Congressional seat," as the Eighth Circuit held. Pet. App. 15a. Indeed, the station's good faith editorial decision to include only the major-party candidates demonstrates the contrary. The lower court's public forum determination accordingly has no basis in either law or fact and should be reversed.

B. The FCC's Longstanding Interpretation Of The Communications Act's Equal Opportunity Requirement Confirms That A Broadcaster's Selection Of Debate Participants Is A Legitimate Exercise Of News Judgment

The conclusion that a public broadcaster's selection of debate participants is an exercise of traditional journalistic discretion -- and thus does not create a public forum -- finds additional support in the FCC's treatment of debates under the equal opportunities provision of the Communications Act of 1934, as amended. 47 U.S.C. § 315(a). For more than twenty years the FCC has held, with judicial approval, that candidate debates are "news events" exempt from the equal opportunities requirement.

Section 315(a) obliges broadcasters to make their facilities available to all legally qualified candidates for a given office if they have allowed one such candidate to appear. In 1959 the Commission ruled that the appearance of the incumbent mayor of Chicago on a local newscast triggered equal opportunities for his opponents in a reelection campaign. *Telegram to CBS, Inc. (Lar Daly)*, 18 Rad. Reg. 238 (1959). Congress, fearing that this ruling would deter broadcasters from presenting political news coverage, responded immediately by amending the statute to exempt four categories of news coverage from the equal opportunities requirement: "(1) bona fide newscast[s], (2) bona fide news interview[s], (3) bona fide news documentar[ies], * * * [and] (4) on-the-spot-coverage of bona fide news events." 47 U.S.C. § 315(a)(1)-(4). *See Fox Broad. Co.*, 11 F.C.C.R. 11,101, 11,107-11 (1996) (discussing history of exemptions).

Although the FCC initially interpreted the exemptions narrowly, since 1975 it has held consistently that television coverage of candidate debates qualifies as "on-the-spot coverage of bona fide news events" exempt from the equal

opportunity rule. *See Aspen Inst. Program on Communications & Soc'y*, 55 F.C.C.2d 697 (1975), *aff'd sub nom. Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976). *Accord Ross Perot*, 11 F.C.C.R 13,109, 13,116 (1996). In 1983, the Commission specifically extended the exemption to broadcaster-sponsored debates. *Henry Geller*, 95 F.C.C.2d 1236, *aff'd sub nom. League of Women Voters* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1983). It reasoned that the identity of a debate's sponsor does not affect the program's news value and that, because "a broadcaster may be the ideal, and perhaps the only, entity interested in promoting a debate between candidates for a particular office, especially at the state or local level," exempting broadcaster-sponsored debates "should serve to increase the number of such events, which would ultimately benefit the public." *Id.* at 1244-45.

The Commission will not interfere with a broadcaster's decision to invite only some legally qualified candidates to participate in a candidate debate, so long as the decision is based on the broadcaster's "'good-faith news judgment.'" *King Broad. Co.*, 6 F.C.C.R. 4998, 4999 (1991) (quoting *Kennedy for President Comm.*, 77 F.C.C.2d 964, 969, *aff'd*, *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417 (D.C. Cir. 1980)). The Commission, moreover, "places considerable reliance on the exercise of a broadcaster's journalistic discretion to determine [a program's] 'newsworthiness.'" *Id.* "'[A]bsent evidence of broadcaster intent to advance a particular candidacy, the judgment of the newsworthiness of an event is left to the reasonable news judgment of professionals.'" *Kennedy for President Comm.*, 636 F.2d at 427 (quoting *Chisholm*, 538 F.2d at 359).

Applying these principles, the Commission has repeatedly sustained both public and private broadcasters' decisions to limit debate participation to the major candidates in a campaign when candidates were selected based on the broadcasters' good faith judgment as to their newsworthiness. *See, e.g., Jim Trinity*, 7 F.C.C.R. 3199 (1992) (upholding public television station decision to exclude candidate from Republican senatorial debate where candidate was behind in polls and failed to "demonstrate that the participating candidates were not chosen on the basis of their

newsworthiness"). *Accord John W. Spring*, 1 F.C.C.R. 589, 590 (1986) (upholding commercial radio station decision to air debate on talk radio show among Republican senatorial candidates although six qualified candidates were excluded); *Cyril E. Sagan*, 1 F.C.C.R. 10 (1986) (upholding noncommercial television station decision to exclude candidate from Democratic senatorial debate based on candidate's low standing in public opinion poll).[7]

In short, two decades of Commission and judicial precedent interpreting the Communications Act confirm that the "common denominator" of broadcasters' decisions to sponsor debates, to determine their format, and to limit participation to selected candidates is "bona fide news value." *Henry Geller*, 95 F.C.C.2d at 1244.[8] Thus, under federal

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[7] *See also Ross Perot*, 11 F.C.C.R. at 13,116 (Reform Party candidate's exclusion from debate sponsored by Commission on Presidential Debates to be broadcast by commercial television networks did not trigger equal opportunity requirement); *Arthur R. Block, Esq.*, 7 F.C.C.R. 1784, 1785 (1992) (equal opportunity requirement not triggered by exclusion of legally qualified presidential candidate from debate produced by McNeil/Lehrer Productions to be aired on PBS stations because candidate failed to present "objective evidence," such as polling data, "sufficient to demonstrate that she [wa]s a major presidential candidate"); *Mitchell Rogovin, Esq.*, 7 F.C.C.R. 1780, 1781 (1992) (presidential debate sponsored by Democratic National Committee and aired on commercial television station did not trigger equal opportunities for candidate who did "not present[] objective criteria sufficient to demonstrate that he [wa]s a major presidential candidate"); *Carl E. Person, Esq.*, 6 F.C.C.R. 7477 (1991) (upholding exclusion of legally qualified presidential candidate from debates to be aired on commercial stations and PBS); *Lenora B. Fulani*, 3 F.C.C.R. 6245, 6246 (1988) (commercial networks' coverage of presidential debate between major-party presidential candidates did not trigger equal opportunities provision where excluded candidate failed to show that broadcasters' decision "was motivated by bad faith rather than the requisite good faith intent to air what was perceived as a bona fide news event").

[8] Most recently, the Commission also has extended the news exemption to allow public broadcasters to make blocks of time available to selected candidates for office. In *Fox*, the Commission approved a PBS proposal to telecast unmoderated statements by certain presidential candidates selected by such criteria as national

law, a decision to sponsor a debate and determine its participants is an exercise of news judgment, and not an indication of a broadcaster's intention to open its facilities to all legally qualified candidates, as the Eighth Circuit erroneously concluded. The lower court's public forum determination disregards the regulatory regime crafted by Congress and the Commission and mistakenly calls the agency's longstanding policies into question.[9]

C. The Eighth Circuit Holding Will Sharply Limit Public Broadcasters' Sponsorship Of Candidate Debates And Other Political News Coverage

Public broadcast stations play a vital role in bringing candidate debates to the American public. Consistent with their public service mission and journalistic responsibilities, public television and radio stations frequently sponsor and broadcast debates between candidates for local, state, and federal office. For purposes of this litigation, amici surveyed member stations and determined that public broadcasters sponsored and telecast well over three hundred candidate debates during the 1996 election year cycle alone. Such programming significantly enhances the public's knowledge about elections at all levels of government.

The Eighth Circuit ruling, if affirmed, will sharply limit public broadcasters' sponsorship of debates. If, as the court below ruled, public broadcast stations must invite all qualified

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polling data. The Commission concluded that such presentations would not trigger the equal opportunities requirement because there was no "basis to question the good faith news judgment of PBS with respect to its decision to broadcast the event." 11 F.C.C.R. at 11,113. The Commission has also approved programming produced in cooperation with local PBS affiliates that makes free air time available to major candidates in senatorial, congressional, and gubernatorial races. *A.H. Belo Corp.*, 11 F.C.C.R. 12,306, 12,309-10 (1996).

[9] The Commission's interpretation of the Communications Act is not, of course, dispositive of the constitutional issue presented here. Nonetheless, this Court has held that, when evaluating First Amendment claims involving the broadcast media, the Court "must afford great weight to the decisions of Congress and the experience of the Commission." *CBS* v. *DNC*, 412 U.S. at 102.

candidates to participate, there will be a flood of candidates claiming a constitutional right of access. This glut of candidates often will make such programs impractical to produce and inevitably will cause public stations to curtail debates. Thus, the Eighth Circuit's expansion of the public forum doctrine ironically will produce less speech and less public debate on campaign issues -- precisely the opposite of the effect intended by that court. It also is a result contrary to the central purpose of the First Amendment.

Most debate experts agree that including all candidates in broadcast debates is often infeasible because of the sheer number of candidates. *See* Twentieth Century Fund Task Force on Presidential Debates, *Let America Decide* 148 (1995). In 1988, for example, about 280 people filed statements with the Federal Election Commission indicating that they considered themselves to be presidential candidates. Of these, 168 actually declared as candidates, and 23 appeared on the ballot in one or more states. *Id.* Likewise, 23 presidential candidates appeared on state ballots in the 1992 election cycle, and 21 appeared on ballots in 1996. *See Fox*, 11 F.C.C.R. at 11,105 n.10; Federal Election Commission, *1996 Presidential Candidates on the General Election Ballots of Each State and the District of Columbia* (Oct. 18, 1996) <http.//www.fec.gov/96fed/pballots.htm>.

Candidates for offices at other levels of government also abound, and it is a simple matter for unaffiliated candidates to attain ballot status in many jurisdictions. In Tennessee, for example, an individual needs to obtain only *25 signatures* to qualify as a candidate for any office, Tenn. Code Ann. § 2-5-101(b)(1), and in Oklahoma, a candidate need not obtain any signatures at all, but may appear on the ballot after payment of a modest fee. Okla. Stat. Ann. tit. 26, § 5-112 (requiring payment of $750 (U.S. House), $1,000 (U.S. Senate), or $1,500 (Governor)). Many other states have lenient signature

requirements for ballot qualification for local,[10] state,[11] and federal offices.[12]

Not surprisingly, therefore, races among as many as 11 candidates for a single office were not uncommon in 1996. Eleven candidates qualified for the ballot in separate Tennessee and Texas congressional elections; 9 in the New Jersey Senate race; 7 each for the Tennessee Senate race and the Vermont gubernatorial race; and 6 each for senatorial and congressional races in California, Illinois, Iowa, Massachusetts, Michigan, Mississippi, New Jersey, Oregon, and Tennessee. *See 1996 Election Results*, 54 Congressional

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[10] *See, e.g.*, Ark. Code § 7-7-103(d)(1) (10 signatures required to run for municipal office); Idaho Code § 34-708(2)(d) (5 for county office); Ky. Rev. Stat. Ann. § 118.315(2) (100 for county office; 2 for city office); Miss. Code Ann. § 23-15-359(1)(f) (50 for county office); Neb. Rev. Stat. § 32-618(c) (50 for town office).

[11] *See, e.g.*, Idaho Code § 34-708(2)(c) (50 for state legislature); Iowa Code Ann. § 45.1(3), (4) (50 for state house; 100 for state senate); Ky. Rev. St. Ann. § 118.315(2) (100 for General Assembly); Mass. Gen. Laws Ann. ch. 53, § 6 (150 for state representative; 300 for state senate); Miss. Code Ann. § 23-15-359(1)(e) (50 for state legislature); R.I. Gen. Laws § 17-14-7(d), (e) (50 for state representative; 100 for state senate); Vt. Stat. Ann. tit. 17, § 2402(b)(2), (3) (100 for general assembly; 200 for state senate); Va. Code Ann. § 24.2-506(3), (4) (125 for House of Delegates; 250 for Virginia Senate).

[12] *See, e.g.*, Idaho Code § 34-708(2)(a), (b) (500 House; 1,000 Senate); Iowa Code Ann. § 45.1(1), (2) (300 House; 1,500 Senate); Ky. Rev. Stat. Ann. § 118.315(2) (400 House; 5,000 Senate); Miss. Code Ann. § 23-15-359(1)(a), (c) (200 House; 1,000 Senate); R.I. Gen. Laws § 17-14-7(a), (b) (500 House; 1,000 Senate); Utah Code Ann. § 20A-9-502(2)(a)(i), (ii) (100 House; 300 Senate).

In other jurisdictions a candidate can obtain a place on the ballot with signatures from as few as one percent of eligible voters or of the number of voters who participated in a recent election. *See, e.g.*, Alaska Stat. § 15.40.190; Conn. Gen. Stat. Ann. § 9-453d; Del. Code Ann. tit. 15, § 3002(b); Ga. Code Ann. § 21-2-170(b) (for statewide elections); 10 Ill. Comp. Stat. Ann. 5/10-3 (same); Mich. Comp. Laws § 168.590b(2) (same); Minn. Stat. Ann. § 204B.08 subd. 3(a) (same); Nev. Rev. Stat. § 293.200(1)(b); Or. Rev. Stat. § 249.740(1); S.D. Codified Laws § 12-7-1; W. Va. Code § 3-5-23(c).

Quarterly Weekly Report 3250, 3250-57 (1996). No less than 19 candidates ran for governor in New Jersey in 1993. *See Judge Gives All Candidates Right to Ballot Statement*, N.Y. Times, Sept. 11, 1993, at A26.

In such contests, as the Twentieth Century Fund Task Force on Presidential Debates has recognized, opening the door to every qualified candidate "may actually undermine the educational value and quality of debates" and "erode public perceptions of the legitimacy of the debates process." *Let America Decide* at 19, 148. A multiple-candidate debate can impair "the voters' ability to focus sharply on the major candidates and minimize the time available to the major candidates to share their views with the electorate." *Id.* at 19. Moreover, because major-party candidates may refuse to appear on a crowded podium, requiring such a format risks their nonparticipation. *Id.* at 19-20. For these reasons, broadcasters planning to host a debate may well determine that inviting every declared or legally qualified candidate to participate would be not only unmanageable, but also contrary to the public interest.

This is not to suggest that debates including independent or third-party candidates are never newsworthy or in the public interest. A multicandidate debate may well be useful, for example, during primary season when the candidates are largely unknown and the issues in the campaign are only beginning to develop. The point is not that one debate format is always preferable to another. Rather, the decision as to the appropriate format and presentation requires the application of editorial judgment to the particular circumstances of each case. It cannot be made *a priori* by a court.

As discussed above, Congress has long recognized that an absolute right of candidate access to news programs "'would tend to dry up meaningful radio and television coverage of political campaigns,'" *Chisholm*, 538 F.2d at 352 (quoting S. Rep. No. 86-562 at 10 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2564, 2572), because it would require broadcasters to "'assume[] the burden of presenting a parade of aspirants.'" 538 F.2d at 352 n.5 (quoting S. Rep. No. 86-562 at 9, 1959 U.S.C.C.A.N. at 2571). The FCC similarly has extended the equal opportunities exemption to broadcaster-sponsored debates on the ground that a rigid

right of access for all candidates would deter broadcasters from hosting debates. The Eighth Circuit's equal access rule ignores this deterrent effect and jeopardizes future sponsorship of candidate debates by public broadcasters.

Indeed, the Eighth Circuit holding requires public broadcasters to include candidates in their debates in precisely the same circumstances that led Congress to add the news exemptions to Section 315. The holding would force a public broadcaster to invite to its debate a latter-day Lar Daly -- the "perennial candidate" who "created a national furor" when the Commission ruled that he was entitled to equal time by virtue of news coverage of the Mayor of Chicago during a reelection campaign. *Fulani* v. *FCC*, 49 F.3d 904, 908 n.5 (2d Cir. 1995) (internal quotation marks omitted). "Campaigning in an Uncle Sam costume and using the nickname 'America First' in many of the ballots on which he appeared, Daly ran unsuccessfully for more than 40 elections until his death in 1978." *Id.* It is small wonder that some stations would forego debates entirely rather than host an event that so degraded the political process.

This problem is far from speculative. In August 1996, for example, just after the ruling below, the Nebraska Educational Telecommunications Network canceled a scheduled debate between the major-party contenders for the United States Senate due to access demands by less newsworthy candidates. *See* Don Walton, *Senate Debate at Fair Canceled*, Lincoln Journal Star, Aug. 24, 1996 at 1A; *Name on Ballot Not Enough to Qualify For Political Debate* (editorial), Lincoln Journal Star, Aug. 27, 1996, at 4B.

The Eighth Circuit holding, moreover, cannot logically be confined to candidate debates and thus also threatens public broadcasters' coverage of political campaigns generally. If an invitation to two candidates to participate in a debate opens a forum for all, it is difficult to see why a public station's coverage of one candidate on a newscast, or in a news interview or documentary program, does not similarly trigger constitutional access rights for every other candidate. As the *Chandler* court observed, "[t]he values sought to be fostered by the First Amendment [will] be frustrated, not furthered, by the fitting of such harnesses on public television." 917 F.2d at 490.

D. The Eighth Circuit's Public Forum Holding Destroys The Ability of State-Owned Broadcasters And Publishers To Make Necessary Editorial Decisions

Public broadcasters, like their private counterparts, must make editorial decisions on a daily basis. As this Court has recognized, "editing is what editors are for; and editing is selection and choice of material." *CBS* v. *DNC*, 412 U.S. at 124. Any editorial decision "to broadcast one program excludes, for that time, all other programs." *Chandler*, 917 F.2d at 488. The editorial selection of who shall appear on particular programs is a journalistic choice of equal significance. The Eighth Circuit ruling, by giving every legally qualified candidate for office a right of access to a public broadcaster-sponsored debate, effectively destroys broadcasters' ability to make such necessary editorial choices. *Muir*, 688 F.2d at 1042-43. *See also CBS* v. *DNC*, 412 U.S. at 124 (noting that a right of access for political speakers represents an "erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not").

The Eighth Circuit holding, moreover, is not limited to publicly-controlled broadcast stations. It also creates a presumptive constitutional right of access to *any* state-owned or controlled publisher that allows citizens to communicate their views to the public. As the circuit court pointed out, it was immaterial that editorial selections were routine journalistic judgments made in good faith; the "crucial fact" was that the editors were state employees. Pet. App. 16a.

This holding fails to grasp that sound editorial practices cannot coexist with a rule of law that imposes a constitutional right of access on behalf of all speakers in a particular class. For this reason, other courts have routinely rejected claims that government editors have no right to select which articles and advertisements they will choose to publish. *See, e.g., Barnard* v. *Chamberlain*, 897 F.2d 1059 (10th Cir. 1990) (state bar newsletter); *Estiverne*, 863 F.2d 371 (same); *Sinn* v. *The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987) (advertisement in university newspaper); *Avins* v. *Rutgers*,

385 F.2d 151 (3d Cir. 1967) (law review at state university), *cert. denied*, 390 U.S. 930 (1968); *Leeds* v. *Meltz*, 898 F. Supp. 146 (E.D.N.Y. 1995), *aff'd*, 85 F.3d 51 (2d Cir. 1996) (advertisement in school newspaper); *Allston* v. *Lewis*, 480 F. Supp. 328 (D.S.C. 1979), *aff'd*, 688 F.2d 829 (4th Cir. 1982) (bar association newspaper).

As the Fifth Circuit explained in *Estiverne:*

> [T]he Louisiana State Bar Journal, as the trade publication of the Louisiana Bar, * * * serves a narrow, instrumental role. It was not established as an open forum for the expressive activities of the public, or of all members of the Bar. Rather, the invitation is to *submit* articles and advertisements for consideration by the editorial board, within the framework of editorial discretion necessary to fulfill the magazine's purposes. [863 F.2d at 381 (emphasis in the original).]

The court compared the bar journal to the public broadcast stations in *Muir* and concluded that the purpose of the publication "could not be accomplished without the exercise of editorial discretion." *Estiverne*, 863 F.2d at 380 n.12. The Eighth Circuit holding, if affirmed, will severely limit the exercise of journalistic judgment not only by public broadcast stations, but also by all state-owned publishers.

II. EVEN IF DEBATES ARE HELD TO BE LIMITED PUBLIC FORUMS, PUBLIC BROADCAST LICENSEES SUCH AS AETN MAY MAKE REASONABLE JOURNALISTIC CHOICES IN PRESENTING THEM

The government participates in the marketplace of ideas in various ways, including directly, as a speaker, and indirectly, as a platform for the speech of others. As a broadcast licensee, AETN engages in both functions. Even if this Court were to conclude that a limited public forum was created by AETN's sponsorship of a congressional debate, the decision as to the legitimacy of AETN's actions must take into account the controlling principles when government acts as a speaker, as well as the specific context in which it permits the speech of others. *See Denver Area*, 116 S. Ct. at 2383 (First Amendment requires context-specific approach). Here, where

AETN acted as a broadcast licensee with public interest rights and obligations, and where the jury found that it was not engaged in partisan favoritism, this Court should find that its editorial choice was permissible.

A. The Government Is An Important Participant In The Marketplace Of Ideas

Government "speech" takes many forms. Government may speak directly, by conveying factual information, taking a position on a matter of public policy, or criticizing the ideas of others. *See, e.g.*, *Block* v. *Meese*, 793 F.2d 1303, 1313 (D.C. Cir.) ("We know of no case * * * which * * * suggest[s] that 'uninhibited, robust, and wide-open debate' consists of debate from which the government is excluded" (quoting *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)), *cert. denied*, 478 U.S. 1021 (1986). *See also Meese* v. *Keene*, 481 U.S. 465, 480-482 (1987) (Congress may label foreign films as "political propaganda"); *Penthouse Int'l, Ltd.* v. *Meese*, 939 F.2d 1011, 1015-16 (D.C. Cir. 1991) ("We do not see why government officials may not vigorously criticize a publication for any reason they wish"), *cert. denied*, 503 U.S. 950 (1992); *United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989) ("[T]he government speak[s] on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention"), *cert. denied*, 493 U.S. 1094 (1990); *Muir*, 688 F.2d at 1050 (Rubin, J., concurring) ("The federal government * * * publishes 'journals, magazines, periodicals, and similar publications' that are 'necessary in the transaction of the public business'" (quoting 44 U.S.C. § 1108)).

In other circumstances, government participates in the marketplace of ideas by subsidizing speech, or by selecting from among various voices. For example, local school boards have "a substantial legitimate role to play in the determination of school library content." *Board of Educ., Island Trees Union Free Sch. Dist.* v. *Pico*, 457 U.S. 853, 869 (1982) (plurality opinion). Education officials must make "sensitive choices" between subjects to be offered and competing areas of academic emphasis, and "a choice of this nature does not run afoul of the First Amendment." *Id.* at 878 n.1 (Blackmun, J., concurring). *Cf. Rust* v. *Sullivan*, 500 U.S. 173, 194

(1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, * * * it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism").

The government, moreover, is deeply involved in the realm of political speech. State laws determine at the outset which candidates may have an official place in the electoral forum,[13] and this Court has held that states have "important interests in limiting places on the ballot to those candidates who demonstrate substantial popular support." *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976) (per curiam). *See also Timmons* v. *Twin Cities Area New Party*, 117 S. Ct. 1364, 1369 (1997) ("States * * * inevitably must[] enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder"); *Burdick* v. *Takushi*, 504 U.S. 428 (1992) (ban on write-in candidacies upheld); *Storer* v. *Brown*, 415 U.S. 724, 736 (1974) (denial of ballot positions to certain independent candidates upheld because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government"); *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot").

Even where the government directly subsidizes the political speech of certain candidates, the Constitution does not require that all who achieve ballot status qualify for funding. *Buckley*, 424 U.S. at 96 ("Congress' interest in not funding hopeless candidacies with large sums of public money * * * necessarily justifies the withholding of public assistance from candidates without significant public support" (internal citation omitted)); *American Party of Texas* v. *White*, 415 U.S. 767, 794 (1974) (the government is not required to "finance the efforts of every nascent political group"); *Buckley* v. *Valeo*, 519 F.2d 821, 881 (D.C. Cir. 1975) ("[I]n order to provide public funds for some

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13 *See Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas").

candidates for President, [Congress] is surely not required to provide equal funds for all who declare themselves Presidential candidates"), *aff'd*, 424 U.S. 1 (1976). Thus, even when the government provides support for the political speech of private parties, the Constitution does not require funding for all.

Of course, such participation in the marketplace of ideas is not without constitutional limitations. The government cannot engage in invidious discrimination or impose partisan preferences. *See Rosenberger*, 115 S. Ct. at 2520; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 383-384 (1992); *American Party*, 415 U.S. at 781. *Cf. Pico*, 457 U.S. at 870-871 ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books"). Absent an improper purpose, however, the legitimacy of government's participation in the marketplace of ideas depends on the function it is performing. *Rosenberger*, 115 S. Ct. at 2517 (exclusions from a public forum must be "'reasonable in light of the purpose served by the forum'" (quoting *Cornelius*, 473 U.S. at 806)); *Muir*, 688 F.2d at 1050 (Rubin, J., concurring) ("The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions").

B. As A Broadcast Licensee, AETN's Exercise Of Editorial Discretion Is Supported By Public Interest Rights And Responsibilities

AETN is licensed by the federal government to provide broadcast service to further the "public interest, convenience, and necessity," 47 U.S.C. § 309(a), and its actions must be considered in this context. The Communications Act confers certain rights and responsibilities. Any analysis of the various interests involved in AETN's actions "must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century." *CBS.* v. *DNC*, 412 U.S. at 102.

1. The Public Interest Standard Is Grounded In First Amendment Principles

Congress has recognized that broadcasters "are engaged in a vital and independent form of communicative activity," *League of Women Voters*, 468 U.S. at 378, and accordingly has conferred upon licensees broad freedom to make journalistic judgments in the public interest. *CBS.* v. *FCC*, 453 U.S. at 395.[14] In defining the public interest, "Congress specifically dealt with -- and firmly rejected -- the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues," *CBS* v. *DNC*, 412 U.S. at 105, and it "pointedly refrained from divesting broadcasters of their control over the selection of voices." *Id.* at 116 (plurality opinion). For example, Section 326 of the Communications Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. These policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS* v. *DNC*, 412 U.S. at 122.

At the same time, broadcast licensees have certain statutory obligations that are not shared by unregulated media, particularly with respect to political speech. Thus, for example, broadcasters must allow "reasonable access" during political campaigns for "legally qualified candidate[s]" for federal office, 47 U.S.C. § 312(a)(7); they must sell advertising time to political candidates at discounted rates, *id.* § 315(b); and, as discussed above, they must provide "equal opportunities" for candidate appearances where an opponent has used the broadcast facilities, *id.* § 315(a).

This Court has characterized the need to implement public interest obligations in a manner consistent with licensees' editorial independence as "a task of a great delicacy and difficulty" *CBS* v. *DNC*, 412 U.S. at 102, and has found that such requirements "must be viewed in the context of [the

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[14] Broadcast regulation evolved from "a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations." *CBS* v. *DNC*, 412 U.S. at 109.

broadcaster's] journalistic role." *Id.* at 118 (plurality opinion).[15] Thus, as described above, for over twenty years the FCC and the courts have relied on licensees' bona fide news judgments in sponsoring political debates. On the other hand, this Court has upheld "reasonable access" requirements. *CBS* v. *FCC*, 453 U.S. 367. This approach, which emphasizes the importance of editorial independence, preserves the balance established in the Communications Act and is consistent with First Amendment principles.

2. The Same Public Interest Principles Apply With Equal Force to State-Owned Broadcast Licensees

This Court and the FCC have confirmed that public and private licensees should have the same ability to exercise editorial control under the public interest standard. *See Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 650-651 (1994); *League of Women Voters*, 468 U.S. at 394. *Accord Community-Service Broad. of Mid-America, Inc.* v. *FCC*, 593 F.2d 1102, 1108-09 (D.C. Cir. 1978) (en banc); *Muir*, 688 F.2d at 1040. *See also City of New York Mun. Broad. Sys.*, 56 F.C.C.2d 169, 170 (1975) (rejecting argument that the public forum doctrine precludes governmentally-owned broadcast licensees from exercising the editorial independence granted by the Communications Act).

In *League of Women Voters*, this Court invalidated on First Amendment grounds a statutory prohibition against public broadcast stations (including state-owned licensees[16]) airing editorials.[17] The purported concern of the respondent in that

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[15] Accordingly, this Court has noted that the concept of free expression embodied in the public interest standard is "'not that everyone shall speak, but that everything worth saying shall be said.'" *CBS* v. *DNC*, 412 U.S. at 122 (quoting Alexander Meiklejohn, *Political Freedom* 26 (1948)).

[16] The Court noted that at least two-thirds of public television stations are licensed to state public broadcasting authorities or commissions, whose members are often appointed by the governor; state universities or educational commissions; or local governments. *League of Women Voters*, 468 U.S. at 393 n.22.

[17] Although possible, it is not necessary to articulate a constitutional basis for AETN's editorial independence. As noted above, the public interest standard of the Communications Act

case was the same as that expressed here by the court below -- that editorial judgments cannot be entrusted to "employees of government." Pet. App. 16a. *See* 468 U.S. at 393 ("The Government * * * suggest[s] that the source of governmental influence may well be state and local governments, many of which have established public broadcasting commissions that own and operate local noncommercial educational stations"). This Court nonetheless found that Congress "imposed no special requirements to restrict state or local control * * *, and, indeed, it ensured through the structure of the Act that these stations would be as insulated from federal interference as the wholly private stations." *Id.* at 394. It expressly relied on the balance of interests created by the Communications Act, reasoning that "the public's interest in preventing public broadcasting stations from becoming forums for lopsided presentations of narrow partisan positions is already secured by a variety of other regulatory means that intrude far less drastically upon the 'journalistic freedom' of noncommercial broadcasters." *Id.* at 397-398 (quoting *CBS* v. *DNC*, 412 U.S. at 110).[18]

Compared to commercial licensees, moreover, public broadcasters generally have added protections against

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embodies First Amendment values but confers statutory rights. *See, e.g., Muir*, 688 F.2d at 1041. Thus, in *Syracuse Peace Council* v. *FCC*, 867 F.2d 654, 659-660 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), the D.C. Circuit found that the constitutional and statutory values of editorial independence are coextensive and upheld a Commission decision to eliminate the fairness doctrine solely on statutory grounds. *See id.* at 658-659 (judgment that the doctrine "'results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists'" did not require a First Amendment finding and could be upheld entirely under the public interest standard (quoting *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5052 (1987)).

[18] In *Turner*, the Court confirmed that noncommercial stations "are subject to no more intrusive content regulation than their commercial counterparts." 512 U.S. at 650. "'The FCC itself has recognized that 'a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations.'" *Id.* at 651 (quoting *Public Broad.*, 98 F.C.C.2d 746, 751 (1984)).

partisanship through structural requirements in the Public Broadcasting Act. *See id.* at 386-388.[19] At the state level, AETN is chartered "for the purpose of making the benefits of educational television available to and promoting its use by inhabitants of Arkansas." Ark. Code Ann. § 6-3-105(a). AETN's editorial judgments regarding news and campaign coverage are also governed by the Statement of Principles of Editorial Integrity in Public Broadcasting -- to which the vast majority of government-affiliated licensees subscribe -- and by its own established programming policy statements. Pet. App. 64a, 82a, 96a; Tr. 186-197. Under established policy, AETN maintains its independence "by shielding the program[ming] process from improper political pressure" and by basing each programming choice "on its value in the marketplace of ideas." *Id.* at 189-190.

C. AETN's Editorial Choice In This Case Should Be Upheld

Viewed in the context of its public interest rights and obligations as a broadcast licensee, AETN's news judgment concerning its congressional debate was reasonable and should be upheld. The state government in this case is not acting as a licensing body, determining which speakers may appear in a public park. Instead, as another Eighth Circuit panel recently observed in a case involving similar facts, AETN is "a government agency which is also a media organ" that, "[b]y its very nature and under controlling policies, * * * *must* be concerned with the newsworthiness of the issues and speakers included in its programming." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1142 (8th Cir. 1996) (emphasis in original).

The *Marcus* decision well illustrates the significance of this point. There, the court found that public broadcasters may

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[19] The Act was adopted to "facilitate the development of public telecommunications and to afford maximum protection to such broadcasting from extraneous interference and control." 47 U.S.C. § 396(a)(10). *See also id.* at § 396(c)-(f) (establishing a bipartisan structure for the Corporation for Public Broadcasting); *id.* § 396(f)(3) (prohibiting political contributions); *id.* § 396(k)(6)(A)-(B) (establishing objective criteria for grants to be used at the discretion of local licensees).

limit debate invitations to certain candidates because "'newsworthiness' is peculiarly a decision within the domain of journalists," and it concluded that the state television licensee in that case had "a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates." *Id.* at 1142, 1144. The same findings apply with equal force here.

The reasonableness of AETN's decision is also underscored by the fact that less newsworthy candidates for federal office, such as Forbes, have a statutory right of "reasonable access" to air time on AETN. 47 U.S.C. § 312(a)(7); *Political Programming Policies*, 7 F.C.C.R. 678, 681 (1991). Moreover, since public television stations do not sell advertising, such time is provided without commercial time charge, unlike the access time provided on commercial stations.

Forbes may complain that such access does not put him on an equal footing with candidates who appear in debates, but equality is not required. *Buckley*, 424 U.S. at 97-98 ("'Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike'" (quoting *Jenness*, 403 U.S. at 441-442)). As this Court recently noted, "[m]any features of our political system * * * make it difficult for third parties to succeed in American politics." *Timmons*, 117 S. Ct. at 1371. Where a candidate has exerted little effort, has no staff or public support, has raised few funds and has attracted little public attention, it is not reasonable to demand that the government level the playing field by altering its election laws, subsidizing his campaign or, as here, placing him on a debate platform with major-party candidates. *See Buckley*, 424 U.S. at 98 ("Identical treatment of all parties * * * would also artificially foster the proliferation of splinter parties" (internal quotation marks omitted)).

The Eighth Circuit seemed to be concerned that a state-owned broadcaster would deliberately attempt to influence the outcome of an election by not allowing those with whom it disagreed to debate. Such concern is unfounded in this and other cases for two reasons. First, there is no question as to AETN's motives in this case: the jury specifically found that the decision to invite the major-party candidates was not

based on political favoritism or on disagreement with Forbes' views. Pet. App. 4a, 22a-23a.

Second, this is the type of factual issue that the FCC is uniquely qualified to face and decide. It has been doing so for years. Broadcast licensees who engage in political favoritism risk fines and even loss of their licenses. *See, e.g., WPRY Radio Broadcasters, Inc.*, 40 F.C.C.2d 1183, 1193-1200 (1973) (license renewal denied and fine imposed where part owner of station who was also a candidate used station to advance his own candidacy and to discriminate against others in the race); *WANV, Inc.*, 54 F.C.C.2d 432 (1975) (station fined for discriminating between candidates); *Western Connecticut Broad. Co.*, 43 F.C.C.2d 730 (1973) (station fined for requiring all candidates in a race -- except the Republican -- to submit in advance scripts for political announcements).

If equal access for political candidates to public broadcaster-sponsored debates is constitutionally required, there is "no principled basis upon which that rule could be limited to the candidate who has obtained a ballot position and not extended to all other serious candidates." *Chandler*, 917 F.2d at 489. The decision below vividly demonstrates the lack of intelligible standards predicted in *Chandler*, especially when considered in light of the subsequent *Marcus* ruling. The *Forbes* court initially defined the class of speakers qualifying for a right of access as including "legally qualified candidates." Pet. App. 15a. It further noted the political success of some write-in candidates and stated that whether a candidate is viable "ultimately [is] a judgment to be made by the people of the Third Congressional District." *Id.* at 16a-17a. Nevertheless, as evidence of the notion that "[p]olitical viability is a tricky concept," *id.* at 17a, the court subsequently modified its holding to exclude certain debates and candidates. *See Forbes* v. *AETN*, No. 95-2722 WAFS (Sept. 26, 1996) (deleting access requirements for "write-in candidates" and for debates "organized by people or groups other than the defendants") (J.A. 12-13).

The journalistic judgments relied upon in both *Chandler* and *Marcus* provide a far more solid basis for deciding which candidates should be included in candidate debates on public television stations than does the holding in *Forbes* that

sweeps in some poorly defined subset of legally qualified candidates. As the *Marcus* court observed, "professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges." 97 F.3d at 1144.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE COMMISSION ON PRESIDENTIAL DEBATES IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE COMMISSION ON PRESIDENTIAL DEBATES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus the Commission on Presidential Debates ("CPD") is a private non-profit corporation dedicated solely to the sponsorship of general election presidential and vice presidential debates and related voter education functions. CPD has sponsored presidential and vice presidential debates during the 1988, 1992 and 1996 general elections. CPD's debates have been viewed by tens of millions of Americans and have served a valuable voter-education function. As a result of its sponsorship of presidential debates over the last ten years and its ongoing planning and research, CPD is uniquely positioned to

[1] This brief was authored entirely by counsel for *amicus curiae*. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

provide the Court with insight into the impediments to meaningful debates presented by the Eighth Circuit's decision in *Forbes v. Arkansas Educational Television Commission*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes*"). CPD therefore submits this brief as amicus curiae to urge the Court to reverse *Forbes*.

CPD traces its origins to two separate studies conducted, respectively, by the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics. Both studies examined the role of debates in presidential elections and urged the creation of an independent organization dedicated to planning and sponsoring such debates. CPD was created in 1987 in response to these two studies. CPD has been granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code. It receives no funding from the government or any political party, and is governed by an independent board of directors.

The development and application of candidate invitation criteria is an ever-present challenge faced by CPD and other debate sponsors. For CPD, this process is driven by the educational goal CPD was formed to further —to foster general election debates, for the benefit of the voting public, between (or among) the leading candidates for the presidency and vice presidency. CPD's process is conducted consistent with several legal requirements, most notably (1) the requirement set forth in 26 U.S.C. § 501(c)(3) that CPD's activities as a private, tax-exempt organization be nonpartisan, and (2) the requirement set forth in 11 C.F.R. § 110.13(c) that debate "staging organizations" make candidate selection decisions pursuant to "pre-established objective criteria."

Thus, CPD has long recognized the need to develop, and has developed, nonpartisan criteria to ensure that it identifies all of the candidates in a particular election year who, regardless of party affiliation and in light of the educational goals of the CPD's debates, properly should

be invited to participate in those debates. The CPD has eschewed a mechanical approach to making this decision as fundamentally unworkable and inconsistent with its goal of fostering, for the benefit of the voting public, general election debates between the leading candidates for the presidency and vice presidency. The *Forbes* decision, while limited to debate sponsorship by state actors, which CPD most decidedly is not, is seemingly premised on the erroneous assumption that all debates can be effectively sponsored through the use of purely mechanical candidate selection criteria. This assumption is erroneous. CPD urges this Court not to render a decision premised on this flawed assumption.[2]

The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

CPD respectfully refers the Court to the briefing of the Petitioner for a comprehensive presentation of the facts and the procedural history of the *Forbes* decision, which CPD will not repeat here.

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[2] Certain minor party candidates for the Office of President of the United States in 1996 have challenged the CPD's candidate selection criteria by maintaining that the FEC's regulations, which call for the application of "pre-established objective criteria," actually proscribe all criteria except those that can be applied purely mechanically. *See* Federal Election Commission Matter Under Review ("FEC MUR") 4451 (Sept. 5, 1996) and 4473 (Sept. 19, 1996). The pending administrative complaints wrongly conflate "objective" with "mechanical," ignore the drafting history of the FEC regulation in question, disregard the practical implications of such a rule, and urge an approach that would raise serious Constitutional issues as applied with respect to the activities of private debate sponsors. Certain of those points are pertinent to the issues presently before the Court and, accordingly, are discussed herein.

ARGUMENT

The court below emphasized its view that First Amendment principles are threatened when a state actor serving as a debate sponsor renders judgments concerning candidates' political viability. *Forbes*, 93 F.3d at 505. However, as noted, underlying the *Forbes* opinion appears to be an assumption of potentially broader application: that a purely mechanical approach to candidate selection, *e.g.*, automatically including all candidates qualified to appear on a particular ballot, is a universally workable and desirable approach to debate sponsorship.

The CPD's experience is to the contrary. In fact, the application of a strictly mechanical approach to candidate selection "ties the hands" of the debate sponsor and runs an unacceptable risk of resulting in crowded and cacophonous debates that may well not include the leading candidates for office. Thus, the Eighth Circuit's rule would inhibit meaningful debates rather than promote them.

First, a strictly mechanical approach of the sort mandated by the Eighth Circuit runs the risk of creating crowded debate stages in which the voices of the leading candidates (*i.e.*, those in whom there is the greatest public interest) are drowned out by a plethora of legally qualified candidates with little or no public support. This problem is inherent in an approach that does not condition debate participation on the demonstration of significant public interest in a campaign.[3] It is one thing to recognize

[3] The Eighth Circuit, undoubtedly believing it was striking a blow for robust debates and inclusiveness, articulated a simple standard. The court ordered the inclusion of all "legally qualified" candidates, which the court equated with appearing on the ballot. However, this approach is both underinclusive (insofar as it ignores write-in candidates), and overinclusive (insofar as it assumes ballot access equates to public interest in a candidate). Ballot access, particularly in House and Senate races, is not necessarily indicative of significant public interest in or support for a particular candidate. *See, e.g.*, Idaho Code § 34-626(a) & (b) (1,000 signatures needed to be on the ballot for Senate; 500 for House); Iowa Code Ann. § 45.1(1) (1,500 signatures needed to be on the ballot for President or Senate).

At the presidential level, examining whether a candidate is "legally qualified" reveals little about the public's level of interest in or support for a campaign. In the three election cycles CPD has sponsored debates, many candidates have been legally qualified (*i.e.*, have appeared on the ballot) in at least one state (in 1988 there were 19; in 1992 there were 23; and in 1996 there were 21). Indeed, even the list of those candidates appearing on the ballot in enough states to win a theoretical Electoral College majority includes candidates with extremely modest public support, including Ronald E. Paul (1988; received .0047 of general election vote), Lenora Fulani (1988 and 1992; received .0024 of 1988 general election vote and .0007 of 1992 general election vote), Andre Marrou (1992; received .0028 of general election vote), Harry Browne (1996; received .005 of general election vote), John Hagelin (1996; received .0012 of general election vote), and Howard Phillips (1996; received .0019 of general election vote).

that a particular debate sponsor, especially during the primary season, may wish to produce a debate that includes all legally qualified candidates, all "declared," candidates, or some other universe of potential debate participants. However, it is quite another to *require* as a matter of law that all such candidates be included, particularly in general election debates. To require the inclusion of multiple candidates with extremely modest levels of public support in such debates seems to place the partisan interests of minor candidates above the public's interest in assessing the candidates who have emerged as the leading contenders for office.

Second, a strictly mechanical approach that requires the extension of debate invitations to all legally qualified candidates runs the risk that the leading candidates will not participate in the debates. Candidates for federal office are not legally required to debate. At all electoral levels, candidates determine whether and under what conditions they will debate. As the District of Columbia Circuit has noted in the context of litigation regarding the extension of invitations to participate in CPD's 1988 general election presidential debates, it is speculative at

best to assume that the leading candidates would agree to share the stage with candidates enjoying only scant public support. See *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Circuit 1991), *cert. denied*, 502 U.S. 1048 (1992). The Eighth Circuit's rule raises the specter of debates that do not consistently include the leading candidates.[4]

Third, although the *Forbes* decision, as noted, only extends to state actors, it is imperative to note when considering restrictions on debate sponsors' discretion that private sponsors of debates have important First Amendment rights of their own that must be respected. The only governmental interest that is sufficiently compelling to justify restrictions on the expression of participants in the political process is the prevention of corruption or the appearance of corruption. *See, e.g., Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981) (limits on poliitcal activity are contrary to First Amendment unless they regulate large contributions given to secure a political *quid pro quo*); *Buckley v. Valeo*, 424 U.S. 1, 14, 18 (1976). Thus, in a case arising out of

[4] A sponsor of general election debates, such as CPD, that hopes to provide the electorate with a debate that includes the leading candidates faces a difficult task: to be inclusive enough to invite each of those individuals who genuinely qualify as a leading candidate, but not so inclusive that the candidates in whom the electorate is most interested refuse to participate. It is difficult to conceive of pre-established, purely mechanical criteria that could consistently strike the delicate balance needed to serve this legitimate voter education goal.

It is worth noting that minor party candidates who have urged that CPD and other debate sponsors employ purely mechanical criteria have rejected the use of public opinion polls as the basis for debate participation. Those candidates, presumably anticipating that their level of public support as measured by such polls would not result in their receipt of invitations to debate the leading candidates, have condemned such polls as biased and subjective. CPD has not favored the simplistic use of polling data as the sole basis for debate participation. CPD certainly considers polling data a useful and appropriate indicator of public enthusiasm and concern to be weighed when making candidate selection decisions.

the 1996 presidental debates, the D.C. Circuit expressly noted that "if this court were to enjoin the CPD from . . . choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights." *Perot v. Federal Election Commission*, 97 F.3d 553, 559 (D.C. Cir. 1996), *cert. denied*, No. 96-1286, 1997 WL 71417 (May 12, 1997), *citing Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, —— U.S. ——, 115 S.Ct. 2338 (1995).

CONCLUSION

For the foregoing reasons, Amicus CPD respectfully urges the Court to reverse the decision of the Eighth Circuit in *Forbes*.

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In the

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Petitioner,

v.

RALPH P. FORBES,

Respondent.

On Writ of Certiorari
in the United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of New Jersey files this amicus brief to bring to the Court's attention its statutory scheme regarding televised interactive debates for gubernatorial candidates, which are conducted under the jurisdiction of the New Jersey Public Broadcasting Authority, a state agency. Pursuant to state statute, participation in these debates is limited to those gubernatorial candidates who qualify for public financing. That is the singular criterion for participation. As such, neither a candidate's political party affiliation, political philosophy or electoral viability are relevant considerations. This scheme is constitutionally valid because it is based upon

an objective criterion. It is neither viewpoint-restrictive nor content-based.

Accordingly, it is in New Jersey's interest that the Court's ruling in this case neither implicates nor renders suspect the validity of this state's provisions for providing qualified gubernatorial candidates with an additional and meaningful opportunity to express their views to the electorate, to allow for a well-informed exercise of the franchise.

SUMMARY OF ARGUMENT

The state-sponsored televised gubernatorial debates in New Jersey are a unique and integral part of the state's public financing scheme for qualifying candidates. These debates further the state's compelling interest in expanding electoral opportunities for candidates with limited financial means. By way of the debates, such candidates are provided an additional avenue of access to the public to discuss their political ideas and philosophy. Notably, participation in these debates is based upon an objective criterion of qualifying for public financing, by having raised and expended a requisite amount of private contributions. Participation, therefore, is not based upon the political affiliation or viewpoint of the candidates. Nor is participation subject to the decision of those persons responsible for the state broadcasting authority. This statutory scheme, therefore, does not permissibly infringe upon any recognized right. Accordingly, whatever the Court may decide as to the televised debate process at issue in Forbes v. Arkansas Education Commission that decision should not cast doubt on the constitutionality of New Jersey's process for televised debates.

ARGUMENT

THE STATE OF NEW JERSEY'S STATUTORY SCHEME FOR TELEVISED GUBERNATORIAL DEBATES IS CONSTITUTIONALLY VALID UNDER A FIRST AMENDMENT ANALYSIS BECAUSE PARTICIPATION IN THESE DEBATES IS NOT VIEWPOINT-RESTRICTIVE; RATHER IT IS BASED UPON THE OBJECTIVE CRITERION OF QUALIFICATION FOR PUBLIC FINANCING.

Under the First Amendment, the extent to which a state may regulate speech is usually dependent upon the setting or forum in which such rights are sought to be exercised. The Court has held that in the context of a traditional forum where all members of the public have access for expressive speech, such as the "village green," the state's regulation of forum access must be narrowly tailored and further a compelling state interest. See Perry Education Association v. Perry Local Educations' Association, 460 U.S. 37, 45 (1983). A similar limitation applies if a state creates a "limited public forum" which is to be used for a particular purpose or limited to a particular class of speakers. Perry, supra at 46. In the case of a non-public forum, i.e., a setting not traditionally open for expressive activity, the state may impose restrictions that are reasonable and rationally-based. Even in a non-public forum, however, it has been held that a state may not suppress expression because it opposes the speaker's views. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800-801 (1985).

In this case, petitioner, the Arkansas Educational Television Commission, appeals from the decision of the Eighth Circuit Court of Appeals that its decision-making process for participation in televised candidate debates is constitutionally-flawed. 93 F.3d 497 (8th Cir. 1996). This controversy originated with the petitioner's decision to limit participation in the televised debates for the congressional

candidates for the Third Congressional District of Arkansas to those candidates representing the Democratic and Republican parties. Respondent Ralph Forbes, an independent congressional candidate, was, therefore, excluded from the debate.

Forbes filed suit against the Commission alleging that its decision violated his rights of freedom of speech and expression under the First Amendment. The Court of Appeals held that the debates in question were a limited public forum and that the Commission had impermissibly infringed upon the First Amendment rights of Forbes because its decision to exclude him was based upon its subjective determination that he was not a viable candidate. 93 F.3d 504. The Court of Appeals concluded that the Commission's determination was viewpoint-restrictive and, therefore, was not legally sufficient under the First Amendment. 93 F.3d at 505.

New Jersey's system is distinguishable from that at issue in this matter, and the Court should be aware of those differences in deciding this case. In New Jersey, the Legislature has provided for televised debates for gubernatorial candidates, which are conducted under the auspices of the New Jersey Public Broadcasting Authority. These debates are an integral component of the State's public financing scheme for gubernatorial candidates. The legislative intent of such financing is set forth in N.J. Stat. Ann. 19:44A-27, as follows:

> It is hereby declared to be a compelling public interest and to be the policy of this State that primary and general election campaigns for the office of Governor shall be financed with public support pursuant to the provisions of this act.

Under current law, a gubernatorial candidate qualifies for public financing if he or she raises and expends a

minimum of $210,000, see N.J. Stat.Ann. 19:44A-3(m); N.J. Adm. Code 25:15.3. Qualification for public financing is the triggering element for participation in the debates. The specific statutory provision regarding these debates is set forth in N.J. Stat.Ann. 19:44A-45, in relevant part:

> a. In any year in which a primary election is to be held to nominate candidates for the office of Governor, there shall be held among the several candidates for each such nomination a series of interactive gubernatorial primary debates, in which all "qualified candidates,"...for that nomination who have applied or who intend to apply to receive money for election campaign expenses ...shall participate, and in which any other candidate for that nomination who has...the amount necessary, ...to be deemed a "qualified candidate" may elect to participate,...
>
> b. In any year in which a general election is to be held for the office of Governor, there shall be held a series of interactive gubernatorial election debates, in which all "qualified candidates,"...for election to that office who have applied or who intend to apply to receive money for election campaign expenses...shall participate, and in which any other candidate for election to the office who has deposited and expended the amount necessary,...to be deemed a "qualified candidate" may elect to participate.... [N.J. Stat. Ann. 19:44A-45; emphasis added].

As plainly set forth in N.J. Stat. Ann. 19:44A-45, any qualified candidate who does apply for public financing or intends to apply for public financing is obligated to participate in the debate. Any qualified candidate who chooses to forgo public financing is, nevertheless, entitled to participate in the gubernatorial debates sponsored by the

Authority. N.J. Stat. Ann. 19:44A-45. As noted by the New Jersey Supreme Court in McGlynn v. New Jersey Public Broadcasting Authority, 88 N.J. 112, 125, 439 A.2d 54 (1981), the television access provided by the above statute is an additional means to further the intent of the state's public financing scheme to assist candidates of limited access.

New Jersey's statutory provisions for televised gubernatorial debates were challenged in Arons v. Donovan, 882 F. Supp. 379 (D.N.J. 1995). In that case, Marilyn Arons, a 1993 independent gubernatorial candidate who did not qualify for public financing, filed suit in the United States District Court for the District of New Jersey against several state entities, including the New Jersey Public Broadcasting Authority, regarding the televised coverage of that year's gubernatorial campaign. Part of the relief Arons sought was inclusion in the gubernatorial interactive debates, in spite of her failure to qualify for matching funds. Under First Amendment analysis, the court determined that the New Jersey Public Broadcasting Authority was a "limited public forum" in terms of the televised gubernatorial debates. 882 F. Supp. at 388. Any decision to exclude participation could not, therefore, be "viewpoint restrictive" Ibid. The court found that the plaintiff's exclusion from the debates was solely based upon her failure to qualify for matching funds, as required by N.J. Stat. Ann. 19:44A-45. 882 F. Supp. at 390. The Court held that "This itself is a viewpoint-neutral reason for excluding plaintiff from the debates." Ibid.

While the court in Arons chose to view the debates as a limited public forum, we submit that New Jersey determined whether its gubernatorial debate scheme is constitutionally viable considered to be a limited public forum or non-public forum. Eligibility for inclusion in the debates is by operation of law, based upon a candidate's ability to obtain the requisite financial support which qualifies him or her for

public financing. It is an objective criterion under any conceivable analysis which does not offend any constitutional right of a candidate. It is distinguishable, therefore, from Forbes, and the Court's ruling in this case should not reach New Jersey's statutory scheme.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted whatever the Court may decide in the Forbes case, should not cast doubt on the constitutionality of New Jersey's statutory scheme for televised gubernatorial debates.

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BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, VERMONT AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The 19 amici curiae states, through their undersigned attorneys general, respectfully submit this brief in support of petitioner.

INTEREST OF THE AMICI CURIAE

State and local government agencies have historically been the licensees for at least two-thirds of the public television stations (*FCC v. League of Women Voters of California*, 468 U.S. 364, 393 n.22 (1983)) as well as many public radio stations. This case arises from a debate staged by the Arkansas Educational Television Network (AETN) featuring the two leading candidates for a congressional seat. The decision below essentially holds that whenever such a station, as part of its programing, gives the microphone to an outside speaker, it is creating a "public forum" for the benefit of some class of persons, so that other members of the identified class have the right to appear and speak as part of the program.

Such a rule would seriously affect public television and radio broadcasting stations' ability to fulfill their mission of providing the public with "suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting." *League of Women Voters*, 468 U.S. at 377 (internal markings and citations omitted). Moreover, the *amici*'s interest is broader than the ambit of public radio and television broadcasting. The principle adopted by the Eighth Circuit would extend to programs put on by universities and other state and local entities when they invite outside speakers to participate in programs they are presenting, when they publish edited collections of materials from outside contributors, and even when they mount exhibits using works by outside artists.

SUMMARY OF ARGUMENT

A. When a government selects speakers for public television programing, it is, for purposes of First Amendment analysis, in the role of "speaker." It is not merely providing a "forum" for the benefit of the speakers, but is selecting them and their contributions as part of the presentation which it is authoring. This posture is unlike the posture in which a "public" vs. "nonpublic" forum analysis is appropriate, *i.e.*, where the government is in the essentially passive role of permitting access to government property for private communicative purposes. As the speaker, the government and its agents are entitled to control the content of their own message. A private person, such as a candidate wanting to participate uninvited in a programmed debate, does not have a constitutional right to alter the message.

B. Applying "forum" analysis to public broadcasting stations' programing would cripple their efforts to provide suitable access to a range of programing and experiences. Even if a particular program were deemed to create a "nonpublic" rather than a "public" forum, the stations would be required to make "viewpoint-neutral" decisions regarding speaker access. This would inhibit the entity's ability to target and meet the programing needs of the audience. The requirement to be viewpoint neutral would eviscerate the editorial function and provide a temptation for abuse by persons who want to take advantage of the audience attracted to a different speaker. Moreover, the same inability to control program content would extend to universities, museums, bar education committees and other public entities with an educational function when they utilize invited speakers or other outside contributors.

ARGUMENT

A. WHERE GOVERNMENT UTILIZES OUTSIDE SPEAKERS TO HELP PRESENT A PUBLIC BROADCAST PROGRAM, IT IS ITSELF SPEAKING AND NOT OPENING A FORUM

The Court has been asked to review a conflict between the Eighth Circuit decision below and the Eleventh Circuit decision in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990) regarding whether, in staging a debate between selected candidates for a particular political office, a governmentally-owned public television station creates a limited "public forum." The object of such analysis is to determine what standards the government can apply when it regulates access to the forum. If it is found that the government has intentionally created a public forum, even one limited to a certain subject matter or certain groups, it must have compelling reasons to exclude anyone unless they do not meet the pre-established criteria. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 55 (1983). If, on the other hand, the "forum is determined to be nonpublic, the state may restrict access to the forum . . . as long as the decision is reasonable and is viewpoint-neutral." *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985).

The Eighth Circuit characterized the debate program as a "forum" and held that by staging it the station opened a limited public forum for the benefit of a class consisting of the candidates for the particular office. Accordingly, the station could not exclude other candidates such as Mr. Forbes. Pet. App. 14a-15a. In *Chandler*, on the other hand, the Eleventh

Circuit focused on the "activity" of presenting a program. It held that the state could control the program's content, as by excluding the third candidate, in order to achieve the purpose of the activity. 917 F.2d at 488. *Amici* argue here that the Eighth Circuit erred in even applying a forum analysis at all to the facts of this case. In making programing decisions, the station itself was, in essence, speaking. It was not providing a forum for the benefit of private speakers. In its role as speaker, rather than mere forum provider, the state actor is not restricted by speaker-inclusive and viewpoint-neutral rules.

1. "Forum" Analysis Does Not Apply Where The Government Itself Is The Speaker, As The Government Is When It Broadcasts Programs On Public Television Stations

Forum analysis addresses the right of access, for private communicative purposes, to government property. As summarized in *Cornelius*, 473 U.S. at 800, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its *property* to its intended purpose outweighs the interest of those wishing to use the *property* for other purposes." (Emphasis added.) It starts with the premise that "'[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n*, 460 U.S. at 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 111, 129-130 (1981)). The concept originally applied to "property" in the sense of real property. The concept has been broadened beyond real estate to include use of channels of communication operated by government, *e.g.*, an internal

school mail system (*Perry*), charitable fund raising-campaigns conducted among federal employees (*Cornelius*), and even subsidies for student publications. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995) ("a forum more in a metaphysical than in a spatial or geographic sense").

Where, on the other hand, the government itself is speaking or subsidizing transmittal of a message for its own programmatic purposes, the message conveyed is not a "forum" to which private individuals might expect any right to access. Just as a private speaker using a public forum has a First Amendment right to control its own message (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995)), the government, although not protected by the First Amendment, is permitted to "control[] its own expression or that of its agents." *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (quoting T. Emerson, *The System of Freedom of Expression* 700 (1970)). When a government-owned public television station chooses the content of its programing, the station is the speaker, just as "[w]hen the University determines the content of the education it provides, it is the university speaking." *Rosenberger*, 115 S. Ct. at 2517. Government may fully "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.*

The debate format here was used with a different intention from that which is associated with the opening of a forum. The intended beneficiary of public television programing is the viewing audience, not the candidates. Public television's

mission is to provide the viewing public with "suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting." *League of Women Voters,* 468 U.S. at 377 (internal markings and citations omitted). To be sure, the candidates who participated in the televised debate were undoubtedly incidental beneficiaries by virtue of the public exposure, just as a working sculptor would be incidentally benefitted by a program in which the artist were interviewed and the artist's works were shown. Similarly, a guest lecturer at a university or the author of a textbook selected for a class would be incidentally benefitted by the exposure and, in the latter case, by royalties. Nevertheless, the entity choosing the programing or curriculum is the editor and is entitled to exercise editorial discretion. Here, government, through petitioner, was speaking by delegation to AETN's executive director, its editor-in-chief. J.A. 108.

By contrast, the government's role as forum provider is different. When, for example, it opens a "public forum," it "does not itself speak or subsidize transmittal of a message it favors but instead . . . encourage[s] a diversity of views from private speakers." *Rosenberger,* 115 S. Ct. at 2519 (1995). The question of whether a forum is public or nonpublic arises when governmental resources are made available to serve the communicative needs of the private speakers, such as the fund raising in *Cornelius*. It is on the initiative of the speaker rather than the government that a private speaker uses government resources to send his own message. In *Perry,* for example, the school mail facilities were "generally *open for use* by the Girl Scouts, the local boys' club, and other organizations." 460 U.S. at 48 (emphasis added). Generally speaking, the private speaker's use is on a self-demand

schedule, with the speaker using the forum whenever the need or desire arises. The forum may be open only periodically, as the fund-raising drive in *Cornelius*. The venue, such as the community theater in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), may also, of course, be booked for other events. Within such constraints, however, the private speaker schedules the use. Thus, in *Lamb's Chapel v. Center Moriches School District,* 508 U.S. 385 (1993), a religious group tried to schedule use of school facilities for the purpose of presenting a film series; in *Widmar v. Vincent*, 454 U.S. 263 (1981), the student group wanted to schedule its own meeting using university facilities. Government's role is just to provide the venue.

2. The Government, Like The Editor Or Manager Of Any Publication Or Broadcast, Remains The Speaker Even Where It Invites Contributions From Third Parties

In this case, the station's status as speaker rather than forum provider was apparently clouded by the fact that the programing at issue turned over the microphone to the candidates. However, the government affirmatively invited the particular candidates and organized the debate in order to inform its audience about the newsworthy subject of the congressional elections and the leading candidates' positions and personas. The station could have presented the topic by having one of its reporters prepare and present a summary. It chose instead to "enlist[] private people to convey its own message." *Rosenberger*, 115 S. Ct. at 2518. Although each of the candidates was undoubtedly seeking to convey the message "vote for me," the station's message was "these people are newsworthy, and this is how they present

themselves and what the have to say." This is the same basic message that a university conveys when it includes in its curriculum a study of Socrates and Plato, namely, that they are academically noteworthy, this is their background and what they had to say.

As the Court pointed out in *Hurley*, the status of "speaker" for First Amendment analysis does not require that the person "generate, as an original matter, each item featured in the communication." 115 S. Ct. at 2345. The role is not forfeited by "combining multifarious voices, or by failing to edit their themes to isolate an exact message." *Id.* Indeed, "the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages," and in publishing them, the newspaper receives the First Amendment protection afforded a "speaker." *Id.* at 2346. The message becomes the editor's own creation when, "[r]ather like a composer," she "selects the expressive units of the [program] from potential participants" to create a particular presentation with her own stamp. *Id.* at 2348.

Thus, even if a governmentally-owned public radio station were to host a talk show, inviting listeners to have the chance to be heard over the air by picking up their telephone, no forum would be created as long as the station maintained editorial control. By contrast, if programing slots were created expressly for the purpose of enabling community groups to air programs of their choice without editorial intervention, this would create a public forum, much like a government-owned theater. *Southeastern Promotions,* 420 U.S. 546.

The pivotal issue is whether the governmental entity affirmatively chooses material as a means of carrying out its own program. The Court noted in *Greer v. Spock*, 424 U.S. 828, 838 n.19 (1975), that "the fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum." *Amici* submit further that utilizing outside speakers to serve a governmental programmatic purpose does not convert the program into something other than government speech.

B. SUBJECTING GOVERNMENT-AUTHORED PROGRAMS TO FORUM ANALYSIS WOULD SERIOUSLY CRIPPLE MUCH GOVERNMENT SPEECH

If programing produced by government-owned entities had to be submitted to a forum analysis it would seriously hamper such programs regardless of the outcome. Even were the forum deemed nonpublic rather than public, decisions to exclude uninvited and unwanted participants would have to be governed by viewpoint neutrality. *Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum [must be] viewpoint-neutral."). This would mean, as a very obvious example, that a program could not focus on persons deemed newsworthy by the very fact that they represent an unusual viewpoint. Because, under the Eight Circuit analysis, a single program constitutes a separate forum unto itself, the viewpoint neutrality must be reflected in the editorial decisions made within that self-contained forum. It would not be enough that programing were viewpoint-neutral over a particular period, say, a year.

Moreover, on most subjects, and particularly such subjects as how to educate a child or maintain world peace, there are an infinite variety of viewpoints, all of which could not possibly be accommodated within a single program. Viewpoints would either have to be selected by some random process or the producer would have to aim at the probably impossible goal of presenting no viewpoint at all. To the objection that in this case AETN would only have had to add one more candidate to the debate, so that the disruptive effects would have been minor, *amici* respond that once the principle is established, the ramifications are extremely burdensome.

As can be readily appreciated, presenting material with random or no viewpoint would be clearly antithetical to achieving public broadcasting's mission to provide its viewing audience with "suitable access to social, political, esthetic, moral, and other ideas and experiences through the medium of broadcasting." *League of Women Voters*, 468 U.S. at 377. Without a coherent viewpoint there is no "suitable access." Compared to an edited presentation, an unedited collection of personal viewpoints can be rather like white noise: all the frequencies are there, but not in any intelligible form and not tailored to the needs of the listener. Under the public interest standard that governs all television broadcast licensees, the licensees are required to make the inherently subjective determination that their programming decisions are responsive to the needs, problems, and interests of the residents of the area they serve. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969). Clearly, if public television stations are to do their job to target the interests and needs of their audiences, they must be able to edit out those who want to impose their own content on the programming.

Another practical problem is determining how many outside speakers it takes to make a forum. What if a single outside person is invited to be interviewed on a televised program? Even the appearance of that sole person, if he is expected to express an assortment of views on a multiplicity of topics, could saddle the station with knotty issues of defining viewpoint neutrality. Likewise, would a school inviting in a speaker to talk about the dangers of alcohol and drug use also have to invite a speaker who presented an opposing view?

The risk of uninvited persons demanding to intrude on programing is not trivial. By hijacking part of a program that had been planned to showcase another speaker the intruder is also hijacking the other speaker's audience and gaining prestige by being associated with noteworthy persons. In this case, for example, Mr. Forbes did not request equal time under statutory equal access provisions. Had he done so, he would probably not have had a large viewing audience, for he admitted that his campaign had not garnered much interest. J.A. 95-97. Had he been permitted to join the debate, however, he would have had access not only to the channel of communication, *i.e.*, the broadcast facilities, but also to the audience that was drawn by the other candidates in whom the public *was* interested. Because of the added incentive of the audience and association with noteworthy persons, it is realistic to fear a clamoring for access.

Moreover, if the principle were established that using outside speakers in programs creates a forum, it would apply not only to broadcasting but to all other governmental activities that have an educational or informational mission. For example, the Smithsonian Institute, a government agency, regularly puts on lecture series. One of many recent such

series had as its subject the reversion of Hong Kong to China. *The Smithsonian Associate*, April, 1997, p.62. As is typical, lectures for this series were given by outside speakers. Applying the principle that utilizing outside speakers creates a forum, the Smithsonian Institute's ability to put on such lecture series would be infected with the same problems described above. What range of viewpoints on Hong Kong's reversion would have to be accommodated in order to be viewpoint neutral?

Other examples abound. A university press publishes a book consisting of papers written by outside scholars; a museum curator assembles an exhibit of art works created by various artists; a continuing education program is put on by the state's bar association relying on private practitioners to make presentations; a historic park invites persons competent in historical crafts to demonstrate their skills and talk to visitors about what life was like during the time period illustrated. In each instance, a requirement of viewpoint neutrality would wreak havoc.

The viewpoint neutrality requirement does not cause these types of practical problems in managing true government-created fora (be they public or nonpublic) in respect to private communications. As discussed in Section A, *supra*, it is the private individual seeking to use the forum who crafts the message for his own purposes. The message does not represent the government or seek to achieve governmental goals. It is strictly the message of the private party. Thus, government can be quite disinterested in the viewpoint and need not inquire into it. Omitting inquiry into viewpoint lessens rather than increases the transactional burden.

In conclusion, a considerable range of government-sponsored educational and informational programs would be seriously impoverished if the forum doctrine were to apply every time outside speakers or contributors were utilized. Such programs would be impoverished either by content neutrality, or, more likely, by abandonment of the practice of using such speakers because of the attendant problems. Public television would thereby lose the views of person with special expertise, occupying special positions, or having interesting viewpoints.

CONCLUSION

The judgment of the court of appeals should be reversed.

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October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

- v -

RALPH P. FORBES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE CITY OF NEW YORK ON BEHALF OF PETITIONER

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INTEREST OF AMICUS CURIAE

The City of New York ("City") submits this brief as amicus curiae on behalf of petitioner pursuant to Rule 37, subdivision 4. The City urges the Court to uphold the position of the Petitioner in the instant case, and thereby to protect and encourage non-partisan publicly supported efforts to inform and enlighten the public, of which the City's new debate law (Local Law No. 90 of 1996,

hereafter, the "NYC debate law"), set forth, infra, p. 11, is an example.

The NYC debate law was enacted by the New York City Council and signed into law by Mayor Rudolph W. Giuliani on December 2, 1996. The law requires candidates for the three citywide offices of mayor, public advocate, and comptroller, who join the voluntary New York City Campaign Finance Program (hereafter, the "Program") and appear on the ballot, to participate in debates as a condition for receiving public matching funds for their campaigns.[1] See Local Law No. 90 of 1996, codified in New York City Administrative Code § 3-709.5.

Under the NYC debate law, these candidates are required to take part in two debates prior to the primary election and in the first of two debates prior to the general election. The two primary election debates and the first general election debate are open to all candidates who

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[1] The New York City Campaign Finance Program was created by passage of Local Law No. 8 of 1988, the New York City Campaign Finance Act. The Program makes public matching funds available to candidates for elective municipal office who agree to limit the size of the contributions they accept and the amount of money they spend on their campaigns and to provide detailed disclosure of their campaign finances. To qualify to receive public funds that match, up to $1,000, contributions received from individual New York City residents, participating candidates must meet certain threshold fund raising requirements and must be on the ballot. The NYC debate law is the most recent amendment to the City's comprehensive campaign finance reform.

participate in the Program. A second general election debate, however, includes only the "leading contenders" for the relevant office as defined by predetermined objective criteria. This debate may include leading contenders who are not participating in the Program, and is required for those leading contenders who participate in the Program. In addition, an alternate nonpartisan voter education program is provided for Program participants who are not "leading contenders" and thus are not included in the second general election debate.

The NYC debate law provides for the New York City Campaign Finance Board ("CFB"), an independent agency of New York City government, to select organizations to sponsor the debates.[2] The sponsors administer the debates. Sponsors may not be affiliated with any political party or candidate for public office and may not endorse any candidate in the pending election until after the debate in which they are involved. Potential sponsors must set forth objective, non-partisan, and non-discriminatory criteria that they intend to use to identify leading contenders for purposes of the second general election debate.

The NYC debate law serves two distinct public purposes: (1) ensuring that candidates for citywide office will not be able to receive public matching funds without meeting in "face-to-face" debates; and (2) promoting voter

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[2] The debate law provides that the CFB may accept an application "subject to modifications as it deems appropriate and as are acceptable to the sponsor." New York City Administrative Code § 3-709.5(7).

education by bringing about a moderated reciprocal discussion among opposing candidates.

The provisions of the NYC debate law balance these two goals. Limiting participation in the debates to candidates who have joined the Program, in general, avoids giving an unfair strategic advantage to candidates who do not join the Program and so would otherwise be able to choose based upon campaign strategy whether or not to attend a forum their participating opponents are obligated to attend. Such an unfair advantage could result in a disincentive for joining the Program and, thus, threaten to undermine the City's successful voluntary campaign finance reforms. On the other hand, by providing that candidates who do not join the Program will be invited to the final general election debate if they meet objective "leading contender" criteria, the law seeks to provide the public with at least one forum at which it can view the top opposing candidates, whether or not they are in the Program.

Because the Eighth Circuit's decision, if affirmed and given an expansive reading, could discourage affirmative efforts like the NYC debate law, the City is submitting its views in the instant case.

ARGUMENT

THE EIGHTH CIRCUIT DECISION POTENTIALLY THREATENS THE ABILITY OF GOVERNMENT TO PROMOTE CAMPAIGN DEBATES, WHICH FURTHER CAMPAIGN FINANCE REFORM AND EDUCATE THE PUBLIC; NEW YORK CITY'S PROGRAM IN PARTICULAR FURTHERS THESE GOALS.

By creating the risk that every decision to include or exclude an individual in a discussion or debate will be viewed as a decision to exclude that individual from a "limited public forum," the Eighth Circuit's decision may foster debilitating litigation surrounding the holding of such events, if they are still held at all. Reasonable public education efforts, engaged in with the non-partisan good faith intention of furthering public knowledge of and interest in public policy issues and the electoral process, should not be subjected to such elevated scrutiny. By transforming a reciprocal discussion before an audience (whether a "live" audience or a "broadcast" audience) into a "limited public forum," the Eighth Circuit decision could have the effect of discouraging such efforts.

The NYC debate law has been carefully constructed to ensure that it would be sustained under even close First Amendment scrutiny. Nevertheless, the fundamental objectives of the NYC debate law -- to give the public debates in return for tax dollars made available to Program participants and to educate the public on the views of the candidates -- could be compromised if any decision of this

Court were construed to require that all political debates in any way initiated by a government entity must include all candidates, or to apply an overly stringent level of scrutiny to a non-partisan decision to exclude a candidate. This Court has recognized that "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." Timmons v. Twin Cities Area New Party, 65 U.S.L.W. 4273, 4275 (Apr. 28, 1997) (upholding state law prohibiting fusion candidacies).[3]

In another context, this Court has stated that "the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard." Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 376 (1969). The Eleventh Circuit applied this doctrine in the debate context in Chandler v. Georgia Public Telecommunications Com'n, 917 F.2d 486, 489 (11th Cir. 1990), cert. denied, 502 U.S. 816 (1991), finding that a state's judgment as to which candidates may participate in debates was not "viewpoint restrictive" and did not violate the First Amendment rights of excluded candidates. The Eleventh Circuit's ruling recognized that adopting an inclusionary rule might force television stations "to forego the broadcast of controversial views touching upon

[3] Because it is undisputed in the instant case that the Arkansas Educational Television Commission is a state actor, this amicus brief does not address the state action issue. While the City believes that its limited role under the debate law is clearly distinguishable from state-entity-sponsorship, we also recognize that the NYC debate law entails some government involvement in bringing about debates among candidates.

important public issues . . . lest the airing of such programs require the inclusion of a cacophony of differing views on each subject. The values sought to be fostered by the First Amendment would be frustrated, not furthered, by the fitting of such harnesses on public television." Id. at 489-90. See also Marcus v. Iowa Public Television, 97 F.3d 1137, 1141 (8th Cir. 1996) (in a public television broadcast of a joint candidate appearance, Eighth Circuit distinguished the instant case and determined not to interfere with discretionary choices made by a public broadcaster in fulfilling its "primary mission of serving the public"). Indeed, the danger of an overly restrictive approach in this area, recognized in Chandler, perhaps explains why the outcome thus far in this case does not conform to the view of several Federal courts that have confronted debate participation in reported decisions. Johnson v. Federal Communications Commission, 829 F.2d 157, 164-166 (D.C. Cir. 1987); Fulani v. League of Women Voters Education Fund, 684 F. Supp. 1185, 1192 n. 4 (S.D.N.Y., 1988), aff'd, 882 F.2d 621 (2d Cir. 1989); Martin-Trigona v. University of New Hampshire, 685 F. Supp. 23, 25 (D.N.H. 1988); Koczak v. Grandmaison, 684 F. Supp. 763, 764 (D.N.H. 1988).

Without the discretion to structure debates in a manner that fulfills government's duty to provide information to the public, debates can be unwieldy and counterproductive to voter education. As long as its decisions are neutral and unbiased with respect to candidate viewpoint and political affiliation, government should be afforded the flexibility to make reasonable choices for bringing about debates among candidates that will best serve to fulfill the goals of campaign finance reform and to inform the voting public.

The City believes that imposition of stringent criteria for public support of debates or other public events would lead to a number of harmful consequences. First, some entities would undoubtedly abandon their sponsorship of debates in the future rather than hold debates that include too many participants.[4] Without debate sponsors, New York City would be unable to implement its debate law, and New York City candidates for citywide office would once again be able to receive public matching funds without having to participate in debates. Second, debates attended by a large number of candidates could be unwieldy, unmanageable, and confusing to the public. Debates should afford candidates the opportunity to engage in a focused and informative reciprocal exchange, and give the public the opportunity to benefit from such an exchange.

The contrast between the particular approach taken by the Arkansas Educational Television Commission and that of the NYC debate law demonstrates that the circumstances, resources and needs of thousands of public entities will result in many different approaches to holding debates and other discussions before audiences, with a variety of non-partisan criteria being used to include or exclude participants. In many cases, the discussion may be a fairly informal one, for which complex and formalized criteria would be burdensome and inappropriate. For example, a panel discussion on a government-owned public television station concerning an election-related event that

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[4] In fact, the Nebraska Education Television Network, a state-entity licensee, did cancel a debate in August 1996 as a result of calls by lesser known candidates to be included. See Marcus v. Iowa Public Television, supra, 97 F.3d 1137, 1141 (8th Cir. 1996).

occurred on the same day cannot be weighed down by complex panelist selection criteria. In the case of the NYC debate law, the City has opted to further the values of campaign finance reform and public education through a more comprehensive structure that it has developed several months in advance of the first debates to be held under the City's law.[5] The ability of public entities to develop these varying approaches, indeed to act as a "proving ground" or "laboratory" for public enlightenment and campaign finance reform, is placed at risk by the inappropriate heightened scrutiny imposed by the Eighth Circuit.

The limitations on who will participate in debates under New York City's particular scheme, including the limitation to leading contenders in the general election debate, do not, in any way, reflect agreement or disagreement with any candidate's political views or affiliation. The limitations provide a balance between the inclusionary but objective approach taken in the three earlier debates (which all Program participants on the ballot in the relevant election must attend) and the goal of having at least one debate in which voters can see a focused, in-depth discussion among leading contenders, as reflected by

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[5] Moreover, under the NYC debate law, the candidates ultimately included in the leading contenders debate are determined only after the objective, non-partisan, and non-discriminatory criteria for leading contenders are set and all the other debates have been held. Thus, the debate law provides an opportunity for lesser known candidates to make their case to the public in as many as three debates which, in turn, may result in higher public opinion poll numbers and ultimate inclusion in the leading contenders debate.

objective measures of public support. The latter aspect of the NYC debate law recognizes the value of limiting the number of candidates in a political debate at the conclusion of the campaign period for a more manageable and informative experience for the voting public.

New York City's debate law was enacted to seek to promote voter education and to bring about at least one debate focussed on the leading contenders. It is respectfully submitted that such creative efforts to enlighten the public should not be endangered by an overly restrictive "public forum" analysis that could potentially be applied to a broad spectrum of governmental activities in which no "public forum" has been explicitly designated. Although the determination of the Eighth Circuit does not directly apply to New York City's debate program, which is different from the Arkansas program, an affirmance would

have the potential to stifle the development of such public-spirited activities; such determination should therefore be reversed.

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May 29, 1997

Appendix
N.Y.C. Debate Law

§ 3-709.5 Mandatory debates. 1. In any year in which a primary, runoff primary, general or special election is to be held, any participating candidate for nomination or election to a city-wide office shall participate in two pre-election debates held pursuant to this section for each election in which he or she is on the ballot except that in the second general election debate the candidate shall meet such criteria for participation as may be specified in the application submitted by the debate sponsor pursuant to paragraph (b) of subdivision five of this section. In the case of a primary, the debate shall be among participating candidates seeking nomination of the same political party. If there is no contested primary for an office in a political party then no debate for that party's nomination shall be held pursuant to this section. Each debate held pursuant to this section shall be at least one hour's duration.

2. For purpose of this section, a "debate" shall mean the moderated reciprocal discussion of issues among candidates on the ballot for the same office.

3. The campaign finance board shall select sponsors for two debates for each election in which debates among participating candidates are required pursuant to this section. For a general election, the second debate shall be a debate among the leading contenders for the office, as described in paragraph (b) of subdivision five of this section.

4. Organizations which are not affiliated with any political party or with any holder of or candidate for public

office, which have not endorsed any candidate in the pending primary, special, general, or runoff election for the city-wide office shall be eligible to sponsor one or more of the required debates. The rules for conducting such debates shall be solely the responsibility of the organizations selected but shall not be made final without consultation with the campaign finance board. The organizations selected shall be responsible for choosing the date, time and location of the debates.

5. Written applications by organizations to sponsor an election debate shall be submitted to the campaign finance board on a form provided by the board not later than a date chosen by the board in any year in which an election is held for city-wide offices.

(a) The written application shall:

(i) demonstrate that the organization and any proposed co-sponsor meet the criteria of subdivision four of this section;

(ii) specify the election and office for which the organization seeks to sponsor the debate;

(iii) set forth the date, time, duration, and location of the debate and the specific and exclusive circumstances under which the date or time may be changed, together with a provision for when the rescheduled debate would be held;

(iv) provide a detailed description of the format and ground rules for the debate;

(v) verify that the staging, promotion, and coverage of the debate shall be in conformance with all applicable laws;

(vi) include an agreement to indemnify the city for any liability arising from the acts or omissions of the sponsor; and

(vii) set forth plans for publicity and for broadcast and other media coverage for the debate.

(b) (i) The second debate for a general election shall include only those candidates who the sponsor has determined are the leading contenders for the office on the basis of objective, non-partisan, and non-discriminatory criteria. These criteria must be set forth in the sponsor's written application.

(ii) If the sponsor of the second general election debate has determined that a candidate who is not a participating candidate is a leading contender for the office on the basis of such criteria, the sponsor may invite that candidate to participate in the debate. In the case of a runoff primary election, the sponsor may invite a non-participating candidate to participate in the debate(s). However, if a non-participating leading contender does not accept such invitation to debate or does not appear at such debate, the debate shall go forward as scheduled with the other previously selected leading contender or contenders in the case of a second general election debate or participating candidate on the ballot in the case of a runoff election debate.

(c) In the case of the second general election debate, the application shall also provide for an alternative non-partisan voter education program that the sponsor shall provide for any participating candidates not deemed leading contenders.

6. Prior to choosing a sponsor, the board shall provide for the receipt of comments from interested persons regarding the qualifications of potential sponsors. The board shall consider and give substantial weight to such comments submitted by candidates.

7. Based upon the criteria in subdivision 4 above and any comments received pursuant to subdivision 6 above, the board shall select the organization or organizations to sponsor the election debates and shall provide written notification to the organization or organizations so selected. In addition to the sufficiency of the application, the board shall consider the applicant's ability to reach a wide audience and present a fair and impartial debate. The board may accept an application subject to modifications as it deems appropriate and as are acceptable to the sponsor.

8. For the two primary debates and the first general election debate, the board shall provide each debate sponsor it has selected with a list of candidates who are required to participate in such debates.

9. If a candidate fails to participate in any debate required under this section before an election, the candidate shall be liable for return of moneys previously received for use by the candidate to pay election campaign expenses and shall be ineligible to receive any further matching funds for

that election. For purposes of this subdivision, each primary, general, special or runoff election shall be considered a separate election.

10. Following the submission of a petition on behalf of the candidate and a hearing before the board, the penalty applicable to a participating candidate for failure to participate in any debate as required under this section shall be waived upon a determination by the board that the failure to participate in the debate occurred under circumstances beyond the control of the candidate and of such nature that a reasonable person would find the failure justifiable or excusable.

11. Nothing contained in this section shall preclude any candidate from agreeing to participate in any number of additional debates between any and all candidates for a city-wide office, including those candidates not participating in the campaign finance program. These debates need not be held under guidelines or the purview of the campaign finance board.

No. 96-779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

v.

RALPH P. FORBES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* PEROT '96 IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Perot '96 is the authorized campaign committee for the 1996 presidential candidacy of Ross Perot of Texas and his running mate, Pat Choate of Washington, D.C. Perot and Choate drew some 8,085,294 votes in 1996, and Perot won 19,741,048 votes in 1992.

Perot '96 has a general interest in revitalizing and diversifying American politics. It has a specific interest in opening up public candidate debates—which are critical to forming public opinion and voter choices—to the full breadth and diversity of American political beliefs.

Perot '96 has a particular interest in the outcome of this litigation. Despite the fact that they were on the ballot in all fifty states and the District of Columbia and had received nearly $30 million in federal funding based on Perot's 1992 general election performance, Perot and Choate were excluded by *Amicus* Commission on Presidential Debates ("CPD") from the 1996 presidential debates on the grounds that they had no "realistic chance of winning" the 1996 presidential election. *Perot v. Federal Election Comm'n*, 97 F.3d 553, 556 (D.C. Cir. 1996). Yet, when the privately-run CPD decided to exclude Perot in September of 1996, he stood at precisely the same point in the polls *vis a vis* President Clinton and Senator Dole as he did *vis a vis* President Bush and Governor Clinton in September of 1992, when the CPD decided to permit him to debate. Moreover, the polling data establish that the overwhelming majority of Americans favored the inclusion of Perot and Choate in the 1996 debates. Their exclusion deprived the American people of a critical chance to make a fully informed electoral choice and significantly depressed the general election vote totals for the Perot ticket.

Perot '96 would like to see the Supreme Court declare judgments by subordinate state actors regarding political viability and popularity

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[1] Pursuant to Rule 37.6 of this Court, *amicus* hereby states this brief was authored entirely by counsel for *Amicus Curiae* Perot '96. No person or entity other than *amicus curiae* made a contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

to be inherently discriminatory and unlawful standards for the exclusion of ballot-certified candidates from government-sponsored political debates.[2]

SUMMARY OF ARGUMENT

The Arkansas Educational Television Network ("AETN") argues that its debate should be treated as an exercise of journalistic editorial judgment. However, it did not act here as a neutral journalistic observer of campaign events. Rather, it decided to become an institutional participant in the political campaign by convening a public forum whose sole purpose was speech by candidates for the benefit of the electorate. As a state actor sponsoring a political candidate debate, AETN created a limited public forum.

Having created such a forum, AETN may not restrict access to a single class of candidates without showing compelling reasons for doing so. One interest it offers is to comply with the Federal Communication Commission's ("FCC's") licensing requirements, but nothing in the record or in federal law remotely suggests that the FCC required AETN to exclude Ralph Forbes, or would have taken its license away for allowing him to debate.

AETN also argues that it has a compelling interest to provide special programming not otherwise available to the public. But AETN nowhere explains why it needed to exclude Forbes in order to fulfill its distinctive mission. On the contrary, since private programmers frequently exclude from their debates all candidates but Democrats and Republicans, one would suppose that AETN's mandate to serve the whole public warrants the inclusion of *all* qualified candidates

[2] Perot '96 was unable to get the federal courts to waive the Federal Election Campaign Act's exhaustion of administrative remedies requirement and hear its case on an emergency basis during the campaign, *see Perot* at 556. Thus its complaint with the Federal Exection Commission challenging the CPD's actions is still live and outstanding. *See* Federal Election Commission Matter Under Review, 4451 (Sept. 5, 1996) and 4473 (Sept. 19, 1996). The complaint asserts, *inter alia*, that the CPD's use of standardless and subjective interpretations of political viability for selecting candidates to participate in debates is contrary to FEC regulations, statute, and the Constitution and thus raises issues analogous to those before the Court.

and their viewpoints, including Independents and new or minor party standard-bearers.

AETN has made no showing that the exclusion of Forbes served a narrowly-tailored compelling interest. Nor could it do so. The real reasons for excluding Forbes, as confessed earlier by AETN, were the viewpoint-specific and discriminatory ones of saving more time for the Democratic and Republican candidates and preventing Forbes from receiving the same "legitimacy" and "status" they were being extended.

Even if its debate were not a limited public forum, as a state actor AETN could not discriminate against a qualified congressional candidate on the putative grounds of his viability or seriousness. Such a standard, both as applied in this case and on its face, suppresses speech on the basis of political popularity and thus viewpoint.

AETN applied its unwritten test in a discriminatory fashion. It automatically invited all Republican and Democratic candidates in Arkansas's four congressional districts to participate, including those whose campaigns were hopeless and had no more chance to win than Forbes. It then subjected Forbes, the only Independent congressional candidate in the state, to an *ad hoc* and arbitrary test of his political viability. Forbes had no due process protections and was given no chance to make his case.

Government must be a neutral umpire in elections and may not play favorites with candidates. State legislatures may properly regulate the citizenry's access to a place on the ballot to assure a threshold level of seriousness among certified candidates. However, if subordinate state actors choose to sponsor debates, they must invite all qualified candidates on the ballot and may not invent new tests of candidate seriousness to replace ballot access laws. Once candidates meet agreed-upon threshold standards of seriousness for appearance on the ballot, public opinion must be given free reign to shape government, and not vice versa.

Elections serve purposes beyond certifying the highest vote-getter. They are democracy's way of promoting debate and allow-

ing candidates and parties to infuse new ideas and messages into public discourse. Restricting public debate by giving official effect to anticipated election results undermines these purposes. To exclude candidates on the basis of viability is, by definition, to discriminate against candidates with unpopular or untraditional views or those with fewer resources. The fact that AETN bore no malice or hostility towards Forbes is irrelevant.

There is no merit to the claim that upholding the Eighth Circuit's decision will flood governmental debate sponsors since ballot access laws already serve to limit electoral contests to serious candidates. In the last 25 general elections, there have been on average 75 Independent or minor party candidates in the 435 U.S. House districts. Today there would be on average no more than one extra candidate per House district.

ARGUMENT

I. BY ORGANIZING A CANDIDATE DEBATE, A STATE ACTOR CREATES A LIMITED PUBLIC FORUM AND MAY NOT EXCLUDE LEGALLY QUALIFIED CANDIDATES WITHOUT SHOWING THAT EXCLUSION SERVES A COMPELLING INTEREST

A. By Organizing a Congressional Candidate Debate, AETN Created a Limited Public Forum

When a government-owned television network organizes and stages a debate among political candidates, it creates a limited public forum by "intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (citations omitted). The forum consists of the governmental facilities, resources and time dedicated to expressive activity for the purposes of political debate among candidates. This may be "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."

Rosenberger v. Rectors and Visitors of Univ. of Va., 115 S. Ct. 2510, 2517 (1995).

Such a debate is a limited public forum for speech more than other such fora recently recognized by the Court, including after-school use of school facilities, *see Lamb's Chapel v. Moriches*, 508 U.S. 384 (1993), and a system of university payments to outside contractors for printing costs, *see Rosenberger, supra*. Here, beyond simply opening up its facilities for outside use or paying for the speech of others, the government is directly involved in staging, facilitating and promoting the speech of candidates.

Yet, AETN urges the Court to treat a government-arranged candidate debate as a form of journalistic reportage. See Br. for the Pet. at 24-30. On this theory, when AETN excluded Forbes from its debate, it did nothing more unlawful than omit him from a news report about the campaign. Accordingly, requiring AETN to invite Forbes to join the debate would be like forcing its news editor to profile his campaign when the editor did not consider it "newsworthy."

But the analogy between a government-sponsored debate and government-sponsored news journalism is badly skewed. When a public television network covers a political campaign—including candidate debates sponsored by private groups—it acts as a journalistic observer no different from any other network or newspaper. It does not organize campaign events but records and analyzes them. It is a witness, not a participant, and its corporate decisions do not intervene in the course of the campaign, influence the format of candidate debates, or define the nature and content of political dialogue among the candidates.

However, when a government media entity decides to go beyond simply covering an election campaign and chooses to sponsor a debate among candidates, it assumes a completely different role. It acts not as a journalist but as the convener of a political town meeting, a televised public forum in which candidates debate issues, appeal to voters and answer questions from journalists and citizens.

The whole purpose of sponsoring such a forum is to create a public space for political dialogue. If a government-organized debate is not a limited public forum for political speech, it is hard to imagine what is.[3]

AETN struggles to characterize its forum in such a way as to exclude Forbes by definition. It claims that it intended to define "the class of debate invitees" as "those candidates who had shown public support in their campaigns, who had a realistic chance of winning the election, and in whose views the television audience would be interested." Pet. for Writ of Cert. at 14. Yet this sleight-of-hand begs the constitutional question since AETN may not confine its forum to a sub-class of candidates without demonstrating a *compelling interest* in doing so.[4]

There would undoubtedly be a compelling interest in government restricting a debate to all candidates on the ballot and excluding write-in candidates and non-candidates who want to participate: the interest would be in allowing the electorate to see dialogue among all candidates who have been certified as meeting the state's required threshold of public support necessary to establish them as serious candidates.[5] But Petitioner has offered nothing like a com-

[3] The effort to liken government-run debates to journalism is thus deeply flawed. Acting as a journalist, AETN indeed would have maximum latitude in *covering* debates. If it had covered one sponsored by the League of Women Voters and found that Forbes' statements were not "newsworthy," it would have been free as a journalist to omit him entirely from its news coverage. However, once AETN decided to organize and sponsor a debate of its own, as a state actor intervening in an election campaign it could not treat candidates on the ballot in unequal fashion. As a journalistic entity, AETN can edit its news reports, but as a state actor it cannot edit candidates out of a campaign. It is a "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978).

[4] *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) ("In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject. . . . When speakers and subjects are similarly situated, the State may not pick and choose.").

[5] *Contra* the suggestion of *Amicus* CPD, *see* Br. of *Amicus Curiae* CPD at 4, n. 3, there would clearly be a compelling interest in excluding from debates write-in candidates, since they have not passed the state's legitimate and objective threshold test of political seriousness by securing a place on the ballot. *See infra* Part II.D.

pelling interest for restricting its debate to candidates who it thinks have "a realistic chance of winning."

B. AETN Had No Compelling Interest in Excluding Forbes from its Debate

AETN has experimented with different theories of compelling interest in this case. Its early theories closely reflected its actual reasons for excluding Forbes—to give more time to the two Democratic and Republican candidates and to prevent Forbes from receiving the same "status" and "legitimacy" they would be receiving.[6] Presumably because these reasons are viewpoint-discriminatory,[7] they have been dropped in Petitioner's Brief and

[6] Petitioner has argued that "Mr. Forbes' participation would reduce the time available for debate between the two candidates in whose campaigns, and views, the public was interested." Pet. for Writ of Cert. at 15. It has also invoked an interest in not "giv[ing] Forbes a status" and an "implied . . . degree of legitimacy for his candidacy, that he had not earned on the campaign trail." *Id.* (citing Tr. Trans. at 201-02, 208).

[7] Transferring the debate-time of lesser known, lesser financed or less popular candidates to more established candidates is the very antithesis of the First Amendment: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (citations omitted).

AETN's interest in not extending undue "status" and "legitimacy" to Forbes is dressed-up viewpoint discrimination. AETN admits that its debate confers political "status" and "legitimacy" but states that it wants to preserve these benefits for the Democratic and Republican candidates "in whose campaigns, and views, the public [is] interested." Pet. for Writ of Cert. at 15. AETN never actually did a study to determine whether the public was in fact interested in Forbes' views—or, for that matter, the views of the other candidates. It simply "concluded that the people of Arkansas 'did not want to hear' from Mr. Forbes" and were only "interested" in the views of the candidates AETN assumed they were going to vote for. This is a dubious assumption. Many voters know the views of the established parties and are interested in, and open to, the views of minor party and Independent candidates even if they do not presently plan to cast votes for them. For example, in the 1996 presidential campaign, a huge majority of voters supported including amicus Ross Perot and his running mate Pat Choate in the presidential

replaced by two perfectly respectable interests that have nothing to do with the actual decision to exclude Forbes.

One theory offered is that AETN has a compelling interest "to operate the Network in conformity with the FCC's licensing requirements." Br. for Pet. at 37. AETN actually suggests that allowing Forbes to debate would "cause Arkansas to give up [control over all of its programming], placing its qualifications as a licensee in jeopardy." *Id.* at 38. Aside from the absurdity of suggesting that allowing a third candidate to join its debate would mean surrendering "control over all of its programming," there is absolutely nothing in the record or in federal law to support the proposition that AETN's license would have been "in jeopardy" if it had allowed Forbes to debate. In effect, AETN is arguing that federal law or the FCC somehow *compelled* it to exclude Forbes, which is preposterous.

The other theory advanced by AETN is that it "has a compelling interest to provide the special educational, cultural and informational programming on public television that is not otherwise available to

debates despite the fact that most voters ended up casting their ballots for their opponents. *See Perot Should be Part of the '96 Debates*, S. F. Chron., Sept. 16, 1996, at A20 (reporting Harris Poll finding that 76% of the public said Perot should be invited to debate and ABC News poll finding that 63% wanted him in). Moreover, *Amicus* CPD lost some 100 million debate viewers between 1992, when Perot was allowed to debate his Democratic and Republican rivals, and 1996, when CPD excluded him. *See* John Carmody, *The TV Column*, Wash. Post, Oct. 18, 1996, at D4. Many voters instinctively grasp that "political figures outside the two major parties have been fertile sources for new ideas and new programs" and that "many of their challenges to the status quo have in time made their way into the political mainstream." *Anderson v. Celebrezze*, 460 US 780, 793 (1983) (citations omitted).

But even if AETN had reason to believe that only a minority of voters were "interested" in Forbes' views, it is still the essence of First Amendment discrimination to exclude him for that reason. Withholding government benefits from the champions of unpopular, unfamiliar or even obscure viewpoints is not a valid societal interest. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . . . One's rights to . . . free speech . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.").

the public." *Id.* at 36. Stated at this level of abstraction, the interest is wholly unobjectionable. But what does it have to do with excluding Forbes? Is it AETN's suggestion that every other candidates' debate in the Third District included all three candidates so the "special" mission of Arkansas public television was to provide a two-person debate "not otherwise available to the public?" Surely the opposite is true: If any "special . . . informational programming" is needed by the voting "public" in an election, it is a debate in which all candidates on the ballot have a chance to appear and make their best case. After all, *private* debate sponsors like *Amicus* CPD operate on the theory that they have a First Amendment right to exclude everyone from their debates but Democratic and Republican candidates. *See* Br. of *Amicus Curiae* CPD at 6-7. Given the rampant partisan discrimination of private debate sponsors, the distinctive role of public media is to serve the entire public, including the estimated 20 percent of American voters registered as Independents or as supporters of minor political parties.[8]

There was no public interest in excluding Forbes, much less a compelling one, and in any event, it is abundantly clear that there were far less speech-restrictive alternatives available.[9]

[8] Twenty-seven states and the District of Columbia have electoral systems where voters register as members of a particular party. Of these, 46.7 percent are registered Democrats, 33.8 percent are registered Republicans, 20.5 percent are registered Independents, or miscellaneous, or other third party members. Ballot Access News at 5 (Richard Winger ed., Dec. 12, 1996). Voter registration figures actually understate non-major party preferences because many people register with the major parties simply in order to vote in primary elections. *See infra* note 24.

[9] Even if AETN had a compelling interest in favoring the Democrat and Republican with more time, it could have lengthened the time of its debate or simply added a second debate. If time was so scarce on the network that only two candidates could debate, AETN could have drawn names out of a hat and excluded one of the three qualified candidates at random. *See Rosenberger* at 30 ("government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity" and declaring it "incumbent on the State, of course, to ration or allocate the scarce resources on some acceptable neutral principle[.]").

Similarly, if AETN feared that it might confer on Forbes unwarranted "status" and "legitimacy," it could have broadcast a disclaimer at the start of the show,

II. AS APPLIED BY AETN AND ON ITS FACE, THE SCREEN OF POLITICAL VIABILITY IS VIEWPOINT-DISCRIMINATORY

Whether or not its debate was a limited public forum, AETN could not, as a state actor, discriminate against a qualified congressional candidate on the putative grounds of his "viability" or "seriousness" because such a standard, both as applied here and on its face, discriminates on the basis of political viewpoint.[10] *See Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 804 (1985) (any viewpoint discrimination by government is categorically invalid, regardless of what type of forum exists). AETN applied its viability test in a plainly discriminatory fashion. It subjected minor party candidates to the test but not the Democratic and Republican candidates, no matter how hopeless their electoral prospects. Moreover, viability or "newsworthiness," in AETN's current formulation, are intrinsically viewpoint-specific criteria for choosing candidates to participate in debate because they discriminate on the basis of political popularity.[11]

like the ones that appear at airports regarding religious proselytizers on the premises. The disclaimer could have read: "Because of the requirements of the First Amendment, AETN has invited all three qualified candidates for Congress in the Third Congressional District to debate. This debate is intended to allow the public to hear the candidates on the ballot and make an informed choice, but is in no way meant to confer any undue status or legitimacy by the government on any of the candidates."

[10] AETN appears to have used an unwritten and vague test of political "viability," *see Forbes v. Arkansas Educ. Television Comm'n*, 93 F. 3d 497, 500 (8th Cir. 1996), "seriousness," see Br. for Pet. at 16 ("Ms. Oliver concluded that Mr. Forbes was not a 'serious candidate'"), or, now the favored formulation in the Petitioner's Brief, "newsworthiness." *Id.* at 27. Whatever term AETN now claims to have been interpreting, nowhere did it define by regulation or policy what any of these terms mean or what its test or process actually was. Nor did AETN give Forbes an opportunity to prove his viability or to appeal AETN's findings. Without any opportunity to make his case or to see, much less rebut, evidence of his non-seriousness, Forbes was simply rejected by government officials who consulted, without any policy guidelines, a handful of associates "to get an assessment of how politicians and knowledgeable political observers in Arkansas viewed Mr. Forbes." *Id.* at 15. Respect for due process is so foreign in this context that AETN did not even tell Forbes that it was sponsoring a debate among candidates in his district. (He found out about it by accident.) These conditions are unacceptable for protection of our most precious political freedoms. *See Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988) (stating that the "danger" of "content and viewpoint censorship" is "at its zenith when the determination of who may speak and who may not is left to the unbridled decision of a government official.").

A. AETN's Vague Test of Political Viability Was a Pretext for Political Viewpoint Discrimination Because it Was Not Used to Screen Out Republican or Democratic Candidates Who Had No Chance of Winning

As applied in this case, viability (or any of its euphemisms) operated as political pretext rather than neutral regulatory standard. As Petitioner candidly put it, "AETN made the editorial decision to invite to each debate *only the Republican and Democratic candidates*." Pet. for Writ of Cert. at 2 (emphasis added). Yet AETN made this decision to invite all the Republican and Democratic candidates without considering the political viability of any of them.

The debate AETN sponsored in the First District vividly illustrates the double standard at work. The First District of Arkansas is one of the most Democratic districts in the country and has not sent a Republican Representative to the House since 1868. *Congressional Quarterly's Guide to U.S. Elections* 978-1321 (John L. Moore ed., 3d ed. 1994). In the eight elections prior to 1992, the Democratic candidate received 68.9%, 100%, 100%, 64.8%, 97.2%, 64.2%, 100%, and 64.3% of the general election vote. *Id.* at 1279-1315. The Republican candidate, Terry Hayes, raised only $38,015 compared to the Democrat's $439,343, and so was outspent

[11] As if conceding that it is an illegitimate test for debate participation, AETN now struggles to undermine the Eighth Circuit's conclusion that AETN excluded Forbes because of considerations of his "political viability." *See* Br. for the Pet. at 32-33. It concedes that Forbes' chances of election "were one factor" in its decision, but asserts that there was "far more," yet then proceeds to list six factors that are all indicators of Forbes' political viability: the level of the public's interest in his campaign, the level of news coverage, the extent of his campaign organization, his prior electoral performance, his fund-raising success, and the extent of his public appearances. *Id.* Why would AETN look to any of these "factors" except to determine whether or not Forbes was electorally viable?

better than 11-1. Federal Election Commission Financial Data for House General Election Campaigns Through Dec. 31, 1992, at 22. If we adopt AETN's apparent definition of viability as likelihood of winning the election, the Republican was simply never viable. In the final tally in 1992, Democrat Blanche Lambert, a 31-year old former staff aide in the office of the prior Democratic incumbent, received 69.8% of the vote in her first election compared to 30.2% for Hayes. *See* Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of Nov. 3, 1992*, at 5 (1993). In this district where Democrats outnumber Republicans nearly 3 to 1, the Republican never had a prayer and yet was invited to debate without passing any test of seriousness at all.[12]

A similar story can be told about the Second Congressional District debate, to which AETN invited not only the "popular incumbent," Democratic Congressman Ray Thornton, but "long-shot Republican challenger Dennis Scott," who "filed at the last minute to run, saying ['Ino incumbent should get a free ride.']"[13] Scott had never before held public office and, despite his Republican credentials, raised only $5,724—less than what was raised by Forbes, who collected $9,754. Federal Election Commission Financial Data for House General Elections Campaigns Through Dec. 31, 1992 at 22.[14] Congressman Thornton was overwhelmingly favored to defeat Scott in this strongly Democratic district. In the 1990 election, he captured 60.4% of the

[12] *1992 Election Preview, House: Arkansas*, Cong. Q. Wkly Rep., 3366-67, Oct. 24, 1992.

[13] *Governor's Run for White House Heads Arkansas' Slate on Nov. 3*, The Associated Press, Oct. 24, 1992, *available in* 1992 WL 5148815.

[14] Beyond the obvious double standard at work, it is unconstitutional to use wealth or fundraising capacity as a classification to disadvantage voters and candidates. *See Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Morse v. Virginia*, 116 S. Ct. 1186, 1189 (1996). There is also no record of Scott having a campaign office outside of his home, but AETN used this same fact to penalize Forbes. *See* Br. for Pet. at 15. Of course this snobbish standard, if enacted by the Arkansas legislature as a criterion for ballot or debate access, would be unconstitutional. Ralph Forbes had as much right as Steve Forbes or John F. Kennedy to run his campaign out of his home without being penalized by government. *See* Theodore Sorenson, *Kennedy* 171-172 (1965) (discussing John F. Kennedy's use of his homes in Hyannisport and Palm Beach as the base of his presidential campaign).

vote and then increased his share in 1992, beating Scott by 74.2% to 25.8%, a landslide seemingly disproving any claim that Scott was ever viable in AETN's terms. It is unlikely that any Republican or Independent could have been "viable" given the history of this district in which the prior Democratic incumbent, Rep. Tommy Robinson, achieved victory margins of 85.8% in 1986 and 83.5% in 1988. *Id.* Had he been an Independent or third party candidate, Dennis Scott simply would never have been invited to debate.

Even if AETN's standard of viability were to be neutrally applied in Arkansas or any other state, there would be precious few debates because candidates challenging incumbents are rarely "viable" in the sense of having a "realistic" possibility of victory. The incumbent reelection rate is higher than 93%, and the vast majority of House districts can be reliably assigned to either the Democratic or Republican columns (or Independent in Vermont). *See* Norman J. Ornstein et. al., *Vital Statistics on Congress, 1995-1996*, at 60 (1996) (calculation based on statistics from 1976-1996, inclusively). "More than five out of six incumbents won in every election since 1954, including over 98% of incumbents in 1968, 1986, and 1988." *Dubious Democracy: United States House of Representatives Elections 1982-1994*, at 5, The Center for Voting and Democracy, Aug. 1996. Even in 1994, a good year for challengers, 91% of incumbents were returned to office. *Id.* Most importantly, the vast majority of House races are won every election by a victory margin over 20%, which is "the traditional definition of a political landslide." *See id.* at 3-4. Every House election in Arkansas between 1986 and 1990 was won by a landslide. *Id.* at 19. Thus, most Democratic and Republican challengers are simply never "viable;" they lose by a landslide against an incumbent of the district's majority party.[15]

[15] The same can be said of many Democratic and Republican presidential candidates, like George McGovern in 1972 or Barry Goldwater in 1964, both of whom were widely believed never to have any chance at all. In 1996, the election year when Ross Perot was deemed not "viable" and excluded by *Amicus* CPD, Republican nominee Bob Dole was for months described by the Beltway Establishment as "toast," *see Media Notes*, Wash. Post, Oct. 28, 1996, at D1 and his campaign "dead meat." *See Behind Closed Doors*, The Indianapolis Star, Sept. 29 1996, at B3. *See also Media Notes, supra*, (quoting Albert Hunt, "This

Political party affiliation cannot validly be treated as a proxy for electoral viability in Arkansas (or anywhere else).[16] AETN thus practiced a blatantly discriminatory policy. All Democratic and Republican nominees were invited to debate, whether or not they were politically viable or newsworthy. All *other* candidates were subjected to AETN's vague and unwritten test. This procedure is the essence of partisan-based viewpoint discrimination.

B. Government Has No Power to Label Qualified Candidates as Likely Winners and Losers in a Forthcoming Election or to Award Important Political Benefits on that Basis

Even if it were to apply its vague standard in a non-partisan way, a government actor has no right to name winners or losers in a forthcoming public election, communicate its predictions to the electorate, or selectively favor certain candidates with free publicity and a stamp of implied government approval. The government's proper role is to regulate access to the ballot to assure the seriousness of certified candidates, to offer a public forum to *all* qualified candidates if it wants to sponsor a debate, and, finally, to count the ballots. All candidates must be treated equally regardless of their

election has been over at least since August," Jack Germond: "It's been over for five months," Sam Donaldson: "This election was over last February."). Yet, the politically-skewed viability standard in practice always presumes that nominees of the Democratic and Republican parties are, by definition, "viable" no matter how hopeless political observers consider their chances.

[16] In some states, Independents are incumbents, and Democrats and Republicans long-shots. For example, Vermont has sent Independent Bernie Sanders as its at-large Representative to the U.S. House for the last three elections, and the Democrats have rarely fielded an opponent. *See, e.g.*, Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of Nov. 3, 1992*, at 73 (1993) (no Democratic challenger), Clerk of the U.S. House of Representatives, *Statistics of the Congressional Election of Nov. 8, 1994*, at 41 (1995) (no Democratic challenger).

wealth or social standing, and government may not play favorites in elections.[17]

By pronouncing candidates viable or non-viable and advertising these designations to the electorate, government pastes political gold stars or scarlet letters on citizens running for office. Yet by setting itself up to affirm or reject the credibility of candidates, government usurps the role of the electorate. If "there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics[.]" *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).[18] The official designation of non-viability becomes a self-fulfilling prophecy.

Even if it were constitutional, government has no expertise to make such predictions. Because we have a secret ballot, declaring candidates electable or not is guesswork, and the history of politics is filled with great surprises.[19] The only method politicians and media have of predicting results is polling, but polls can fluctuate and are anticipatory. If AETN had sponsored a debate for candidates in the U.S. Senate Democratic primary in Wisconsin in 1992, it would have excluded the eventual winner of the election, Russ Feingold, because a major poll showed him at 10% of the vote compared to 42% for

[17] James Madison asked, "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." The Federalist No. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

[18] *See also Denver Area Educational Telecom. Consortium v. FCC*, 116 S. Ct. 2374, 2405 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). ("In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.'").

[19] The Eighth Circuit was right to find that "political viability" is "so susceptible of variation in individual opinion" as to "provide no secure basis for the exercise of governmental power consistent with the First Amendment." *Forbes v. Arkansas Educ. Television Comm'n*, 93 F. 3d 497, 504 (8th Cir. 1996). The whole point of a political campaign period is to allow candidates—through popular appeals, organizing, and debates—to change public opinion.

Congressman Jim Moody and 40% for businessman Joe Checota. *See Moody and Checota in Close Race for Senate Nomination*, Milwaukee J., Aug. 16, 1992, at A1. Yet Feingold went on to overcome his rivals less than three weeks after this poll was taken, collecting 69% of the vote to 14% each for Moody and Checota, *see Landslide for Feingold*, Milwaukee Sentinel, Sept. 9, 1992, at 1A, and then went on to defeat the incumbent Republican Senator, Bob Kasten, in the general election.[20]

If government cannot affix descriptions of "viable" or "non-viable" to candidate names on the ballot, it should not be allowed to do that to the candidates themselves during the campaign. AETN's self-appointed political gatekeeping function distorts its legitimate role in democracy.[21]

C. Elections Serve Purposes Broader than Certifying the Candidate With the Most Votes

By defining elections only in terms of who appears likely to collect the most votes and suppressing the voices of others, government chokes off important avenues of political expression and future political development.

An election campaign is more than a numerical and mechanical contest over who will take office when the election is over. It is also democracy's way of promoting robust political debate among citizens and allowing candidates and parties to inject new ideas and

[20] To take another example, public opinion polls showed that Tennessee Republican Senate candidate Bill Frist "would lose by a 53-28 percent margin" to Senator Jim Sasser in 1994, *see* Phil West, *Cooper and Sasser Likely Wins in Senate, Poll Finds*, Associated Press, The Memphis Comm. Appeal, July 28, 1994, at A13, but he ended up beating him 56% to 42%. *See* Clerk of the U.S. House of Representatives, *Statistics of the Congressional Election of Nov. 8, 1994*, at 37 (1995).

[21] "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

messages into popular discussion in order to influence the public agenda. *See, e.g., Illinois Elections Bd. v. Socialist Workers' Party*, 440 U.S. 173, 186 (1979) ("[An] election campaign is a means of disseminating ideas as well as attaining political office."); J. David Gillespie, *Politics at the Periphery*, 27 (1993) (showing how advocacy of woman suffrage and a progressive income tax in the early 1900s by losing Socialist Party candidates led to enactment of the Sixteenth and Nineteenth Amendments); Tom Morgenthau, *Citizen Perot*, Newsweek, Nov. 9, 1992, at 23 (before Perot reentered the 1992 presidential campaign, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss [the] primal issues" of deficit reduction and generational equity, but Perot's candidacy made deficit reduction a central issue in the campaign).

Candidates often run to establish legitimacy for their politics and to position themselves for a future race. For example, after participating in a series of famous debates in Illinois in 1858, Abraham Lincoln lost to Stephen Douglas in his bid for U.S. Senate. But Lincoln went on to win the presidency two years later largely based on his extraordinary debate performance and the political views he espoused while clashing with Douglas.[22] Candidates also run to influence the outcome of the election even if they cannot win it. *See Gillespie, supra*, at 108-09 (explaining how George Wallace was able to deny a popular vote majority to either Republican Richard Nixon

[22] *See* Harold Holzer, *The Lincoln-Douglas Debates* 24 (1993) (noting the pervasive belief that "Lincoln shrewdly used the debates mainly to position himself for the presidency two years later."). Many politicians have suffered multiple losses before finding ultimate success with voters. For example, Robert Casey "made a second career out of running for Governor" in Pennsylvania, where over the course of 20 years from 1966 to 1986, he continuously ran and lost for the Democratic Nomination before finally winning in 1986. He narrowly won in the general election, and was reelected to a second term in 1990 with 68 percent of the vote. *See* Michael deCourcy Hinds, *A Victory Over Illness Plays Well in Politics*, N.Y. Times, Feb. 20, 1994, at A18. *See also* Michael deCourcy Hinds, *The 1992 Campaign: Pennsylvania*, New York Times, Feb. 21, 1992, at A15 (noting Arlen Specter's unsuccessful bid for mayor in 1967, his loss in his reelection campaign for District Attorney of Philadelphia, and his back-to-back losses in the 1976 Senate primary and the 1978 gubernatorial primary before succeeding in his bid for Senate in 1980).

or Democrat Hubert Humphrey, sending a national message). Sometimes a defeat can propel a candidate's political career, such as was the case in Arkansas's Third Congressional District in 1974, when Bill Clinton lost his race for the House, but then went on to be elected Attorney General of Arkansas two years later. *See* Michael Kelly, *The President's Past*, N.Y. Times, July 31, 1994, at F20.

Given declining party allegiance in modern American politics,[23] and the increased interest in new parties and Independent candidacies,[24] third party candidates today can affect electoral outcomes decisively. In the most recent race for the House of Representatives, a special election in the heavily Democratic Third Congressional District of New Mexico, a Green Party candidate received 17% of the vote, which was widely identified as the reason the Democratic nominee, with 40%, lost to the Republican, who won with 42%. *New Mexico 3rd District Voters Choose Republican in Upset*, Associated Press, May 14, 1997, *available in* 1997 WL 2524964, (citing as a "key factor" the presence of the Green Party candidate and "how strongly she attracted support from Democrats"). This result may influence the positions taken by Democratic and Republican candidates in New Mexico on the environmental and health issues raised by the Green Party. In 1994, no less than 18

[23] *See* Gordon Black, *The End of the Two Party Era?*, Polling Report, Sept. 18, 1995. ("The two parties have today lost the firm allegiance of a majority of the American electorate. Nearly 40% of the electorate is fully Independent in its preferences and less than 30% is strongly attached to either of the two parties combined."); Emmet T. Flood and William G. Mayer, *Third-Party and Independent Candidates: How They Get on the Ballot, How They Get Nominated*, in *In Pursuit of the White House* 317 (William G. Mayer ed., 1995) (noting "long-term decay of party allegiances within the national electorate.").

[24] *See* John C. Berg, *Cracks in the U.S. Two-Party System*, at 41, Suffolk University, Presented at the Annual Meeting of the New England Political Science Association, May 3-4, 1996 (showing rapidly growing numbers of Independent and minor party House candidates placing second in general elections and receiving more than 5 percent of the vote); *Third Party Prospects*, CQ Research, Congressional Quarterly, Inc., Dec. 22, 1995, at 1139 ("The disposition to vote for an Independent candidate is higher than it has ever been in the past. While it is difficult to make the choice, it is getting easier," quoting Andrew Kohut, Director of Times Mirror Center for the People and the Press.)

Independents and minor party candidates captured more votes than the margin of victory between the major party candidates.[25]

It is very possible that, had Forbes been allowed to debate by AETN, he would have changed the outcome of the Third District race. The narrow Republican victor, Tim Hutchinson, received 125,295 votes or 50.2% of the total, compared to Democrat John VanWinkle, who received 117,775, or 47.2%. Clerk of the U.S. House of Representatives, *Statistics of the Presidential and Congressional Election of November 3, 1992*, at 5 (1993). Meanwhile, Forbes captured 6,329 votes or 2.5%. *Id.* If Forbes, who describes himself as a strong conservative, had been allowed to debate and had been able to convert just one out of every fifteen of Hutchinson's eventual voters, then the election would have gone to Van Winkle. This, too, would have sent a clear political message. Forbes posed a serious threat to the Republican candidate in the race given that Forbes had captured more than 46 percent of the vote in the 1990 Republican lieutenant governor's primary race, *See* David S. Broder, *A Close Governor's Race in Arkansas?*, Wash. Post, May 31, 1990, at A10, sweeping fifteen of sixteen counties in the Third District.[26] *See* Joint Append. at 171.

[25] *Id.*

[26] To be sure, some people dislike minor party candidates playing a "spoiler" role, but then they do not have to vote for them. And while some may favor a "two-party" system, there is nothing in the Constitution requiring that the two parties be the Democrats and Republicans. The Court has already made clear that minor party candidates have an equal right to run. *See, e.g., Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1367 (1997) (interest in political stability "does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence") (citations omitted); *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983) ("protecting the Republican and Democratic Parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena"); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.") In any event, objections to "spoiler" candidacies are clearly based on how important they might be—not how irrelevant they are.

D. Ballot Access Regulation is the State's Mechanism for Objectively Establishing Candidate Seriousness and State Actors May Not Add to These Requirements in an *Ad Hoc* and Subjective Way to Disfavor Candidates Representing Unpopular Views

Ballot access laws are the state's legitimate and objective way of screening out frivolous candidates and guaranteeing the seriousness of candidates who achieve a place on the ballot. *See Anderson* at 788 n.9 ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates."). These laws embody the state legislature's decision about what level of demonstrated public support and interest is required before a candidate will be deemed serious enough to be certified and placed on the ballot.

In almost every instance, obtaining ballot access (for all candidates but Democrats and Republicans) requires compliance with a labyrinth of regulations and the collection of thousands of individual signatures in an arduous, expensive, time consuming and frequently demoralizing process.[27] A third party today needs to gather more than 1.6 million signatures to qualify candidates in all 435 House districts. *See Third Party Prospects*, CQ Research, Congressional Quarterly, Inc., Dec. 22, 1995, at 1139. In Florida a third party candidate for U.S. Senate needs to collect 196,788 signatures and a House candidate 10,000. *Id.* Thus, the grueling character of state ballot access regulation experienced by Forbes and his volunteers in Arkansas was typical. *See* Joint Append. at 84 ("So it takes 10, 12 hours a day to get even a few hundred signatures . . . . There was a lot of obstacles. It was not an easy task.") (testimony of Ralph Forbes).

[27] *See* Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. of Pub. Law 281, 288 (1993) (discussing the high threshold for ballot access in elections); Flood & Mayer *supra* note 23, at 305 (getting on the ballot "is never an easy undertaking").

Despite the hardships imposed by ballot access laws, such laws provide for objective tests of candidate seriousness. They require collection of a finite number of signatures from real citizens, a test that all candidates understand, that measures seriousness with precise numbers, and that the government can readily certify a candidate as having passed or failed. The signature requirement is clear and amenable to neutral application.

But AETN officials placed extra burdens on Forbes by imposing on him an *ad hoc* and subjective test of his viability as a candidate. Because the State of Arkansas had already certified Forbes' objective seriousness by placing him on the ballot, AETN's test was focused not on his *seriousness*, but on its subjective perceptions of his *popularity*.

When AETN declared Forbes not viable, it meant that he was not popular and had little chance to win.[28] But the First Amendment protects equally the political speech of popular and unpopular citizens, people with maintream views and extreme views. *See Texas v. Johnson* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of a idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted). This principle "has its fullest and most urgent application precisely to the conduct of campaigns for politial office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).[29] If AETN's popularity standard were used to

[28] *See* Joint Append. at 119 ("He didn't have popular support and didn't have a chance to win the election.") (Testimony of Susan Howarth).

[29] It is minor party candidates and Independents who will generally be excluded on the grounds that they are not viable. Yet this circular system ensures self-perpetuating rule by the Democrats and Republicans, a constitutionally disfavored result. *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("[T]he primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties."); *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) ("All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately

determine candidate access to the ballot itself, it would be obviously viewpoint-discriminatory.

However, AETN points to the jury finding that Forbes was not excluded because of any political or personal animosity against him in order to argue that his exclusion on the grounds of viability was viewpoint-neutral. Yet, this is a *non-sequitur*. The test of First Amendment viewpoint neutrality is an objective test that focuses on the nature of a governmental classification that treats two classes of speakers differently. *See generally Rosenberger v. Rectors and Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995). It is not a subjective test that focuses on the intentions or motivations of specific government actors in suppressing a particular person's speech.[30]

The University of Virginia bore no malice or ill will towards religious students or their views, but when it declined to give the same speech privileges to religious student publications as it did secular student publications, the Court found its policy to be viewpoint-discriminatory. *See id.* Similarly, there was absolutely nothing in the record before the Court in *Lamb's Chapel* to suggest that the Center Moriches school system had personal or political hostility towards the religious groups that it was excluding from use of its facilities, but again the Court found the practice viewpoint-discriminatory. *See Lamb's Chapel v. Moriches*, 508 U.S. 384 (1993).

Regardless of the fact that there was no bureaucratic animus against him as a person, the whole purpose and effect of excluding Forbes was to block out presentation of a political viewpoint deemed unpopular by a candidate deemed unpopular. This is the essence of viewpoint discrimination. Nor does the fact that it would exclude unpopular candidates of both right-wing and left-wing views rescue AETN's policy. *See Rosenberger*, 115 S. Ct. at 2518 ("The dissent's declaration that debate is not skewed so long as multiple voices

accepted. Mere unorthodoxy or dissent from prevailing mores is not to be condemned.").

[30] Petitioner's mistake, and the trial judge's confusion on this point, is understandable since subjective animus is often *evidence* of objective viewpoint discrimination, but it is not a necessary factual predicate in order for it to exist as a matter of law.

are silenced is simply wrong; the debate is skewed in multiple ways.").

III. BASED ON EMPIRICAL EVIDENCE, THERE IS NO BASIS FOR THE CLAIM THAT BALLOT-CERTIFIED INDEPENDENT AND MINOR PARTY CANDIDATES WILL OVERWHELM GOVERNMENT DEBATE SPONSORS

Petitioner argues that taking away the viability filter from debate sponsors will cause huge numbers of candidates to flood debates and "public broadasters would abandon the effort." Br. for the Pet. at 29. This is a farfetched scenario and tired canard.

In Arkansas's four congressional districts in 1992, Forbes was the only Independent or minor party candidate running, a sitation far more reflective of our political culture than AETN's hyperbolic forecast. In the last 25 general elections for the U.S. House of Representatives, there have been on average only 75 Independent or minor party candidates running in America's 435 congressional districts.[31] Thus, over the last fifty years, on average fewer than one out of five congressional districts has seen even *one* Independent or minor party candidate on the ballot at election time.[32] The idea that government debate sponsors could not handle non-major party candidates is preposterous.[33]

[31] This figure, along with all the others, was calculated from election returns reported in Congressional Quarterly Almanac and Congressional Quarterly Weekly Report for each of the respective election years from 1948 to 1996.

[32] *Id.* Even if we look at just the last ten years, a period of growth in minor party activity, Petitioner's parade of horribles looks silly. In 1986, there were 91 Independents or minor party candidates; in 1988, there were 154; in 1990, there were 170; in 1992, there were 458; in 1994, there were 256; and in 1996, the peak year this century for minor party House candidacies, there were 487, or just barely more than one per district on average. *Id.*

[33] *Amicus* CPD makes a similar argument that presidential debates would become less manageable if the lock of the two-party system were broken. *See* Br. of *Amicus Curiae* CPD at 4. But in 1996, only three presidential candidates were eligible to receive public funding in the general election, which is the only federal statutory definition of seriousness we have. *See* Ron Scherer, *The Perot Factor: Maverick May Mine Voter Discontent*, The Christian Sci. Monitor, Aug. 20, 1996, at 3 (noting

The idea that non-discriminatory debates would become circuses is implausible, since nationally-televised debates in Democratic and Republican presidential primaries have regularly featured many more than two candidates.[34] Moreover, the suggestion that major party candidates would pull out of debates if others were allowed to participate is both false, as shown by the three-way 1992 presidential debates in which Perot was included, and pernicious, since the CPD is effectively arguing that an anticipatory heckler's veto should be extended to the two major parties.

If the Democratic and Republican candidates in the Third District wanted to debate without Forbes being present, they had every First Amendment right to arrange a private meeting of their own. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). But AETN had no right to set up and pay for a private debate between them and exclude Forbes, who had met every requirement of candidate seriousness set by Arkansas and possessed an equal claim to be a speaker in the government's candidate forum.

Perot, Clinton and Dole's receipt of federal campaign funds). In addition, only four presidential candidates secured ballot status in all 50 states and the District of Columbia, *see* Mimi Hall, *Not to Forget the 18 Other Candidates*, USA Today, Nov. 5, 1996, at 8A, and only six candidates made it onto the ballot in sufficient states to theoretically be able to collect a majority of votes in the electoral college. *See* Donald P. Baker, *Third-Party 'Musketeers' Duel on TV*, Wash. Post, Oct. 23, 1996, at A20. If a government broadcaster were to sponsor a presidential debate (none presently do), it would have any of these stringent, yet viewpoint-neutral, tests available to it.

[34] *See, e.g.*, Bill Lambrecht, *The Democratic Presidential Hopefuls to Use Debate to Kick Off Campaign*, St. Louis Post-Dispatch, Dec. 14, 1991, at 1B (six candidates in Democratic primary debate, including Bob Kerrey, Jerry Brown, Bill Clinton, Tom Harkin, Paul Tsongas and Douglas Wilder), Lloyd Grove, *GOP Presidential Hopefuls Prepare for Premiere Debate*, Wash. Post, Oct. 27, 1987, at A5 (six candidates in Republican primary debate, including George Bush, Pete du Pont IV, Alexander Haig, Jr., Bob Dole, Pat Robertson and Jack Kemp).

CONCLUSION

For the foregoing reasons, *Amicus* Perot '96 respectfully urges the Court to affirm the decision of the Eighth Circuit in *Forbes*.

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AMICUS CURIAE

BRIEF

No. 96-779

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,

Petitioner,

—v.—

RALPH FORBES,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ARKANSAS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to defending the constitutional rights and liberties enshrined in the Bill of Rights. The ACLU of Arkansas is one of its statewide affiliates.

This case implicates two principles that have been central to the ACLU since its founding in 1920: the general free speech right of journalists to make editorial decisions, and the obligation of government not to discriminate against nonmainstream political candidates. *Amici* submit this brief because we believe that the proper resolution of this case must take into account both of these fundamental constitutional principles.

STATEMENT OF THE CASE

Ralph Forbes filed suit in October 1992 against the Arkansas Educational Television Commission (AETC), the Arkansas Educational Television Network (AETN), and other groups, challenging on First Amendment grounds their decision to exclude him from a televised debate among candidates for Congress in the Third District of Arkansas.[2]

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Forbes also sued the members and officers of AETN, and then-Governor Clinton. In addition to his First Amendment claims, he alleged violation of the political campaign equal-access law, 47 U.S.C. §315(a), an issue that the courts did not address since they found that

(continued...)

Forbes had submitted sufficient signatures to qualify for the ballot, and was the only ballot-qualified candidate in the race other than the major party Republican and Democratic nominees.

AETN is a state-owned and operated television network created by Arkansas law, Ark.Stat.Ann. §6-3-101, *et seq.*, for the purpose of developing and enhancing public education, and making its benefits available to the people of Arkansas. *See* Ark.Stat.Ann. §6-3-105(a); note to §6-3-101. The network is governed by the AETC, which has the statutory power to "control[] and supervis[e] the use of channels reserved by the Federal Communications Commission to Arkansas for noncommercial educational use," to "designate the location of stations to utilize such channels," and to "make rules and regulations governing the operation of these stations and the programs televised over these channels." §6-3-105(c), (d). All of the commissioners of the AETC are appointed by the governor with the advice and consent of the Senate for terms of eight years. §6-3-102(b)(1). AETN's Programming Policy recognizes the network's status as a state agency that must, for example, "observe[] the constitutional principle of separation of church and state." Appendix J to Petition for Writ of *Certiorari* at 99a (Cert.App.).

Although a state agency, AETN is not simply a mouthpiece for the ideas and viewpoints of the government of Arkansas. According to its Programming Policy, "AETN maintains public trust in its editorial integrity by shielding the programming process from improper political pressure or influence from program funders or other sources." Cert. App. at 98a. It subscribes to the "Statement of Principles of Editorial Integrity in Public Broadcasting," *id.* at 99a, developed at the Wingspread Conference on Editorial Integrity in 1985, which emphasizes the importance of protecting all public broadcasters from "extraneous interference and control," as well as fostering "journalistic objectivity" and "a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." *Id.* at 68a, 69a.

AETN's Programming Policy also stresses the network's obligation to "further[] the goals of a democratic society by enhancing public access to the full range of ideas and viewpoints required for citizens/voters to make informed judgments about the issues of our time." *Id.* at 100a. It adds: "In matters of public importance that may be controversial, special attention is invested to assure fairness in treatment of different points of view." *Id.*

Nevertheless, in September 1992, AETN denied Forbes' request to be included in the Third District candidates' debate which it had scheduled for October 22nd. Its reason, according to its executive director, was that AETN had "made a bona fide journalistic judgement that our viewers would be best served by limiting the debate to elected nominees of the two major parties." *Id.* at 103a. AETN then promoted the debate with an advertisement that said:

> Do you know your candidate? Get better acquainted with the candidates and the issues. Democrat John Van Winkle of Fort Smith and Republican Tim Hutchinson of Bentonville debate the issues as they campaign for the Third

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[2] (...continued)
§315(a) did not create a private right of action. *See Forbes v. Arkansas Educational Television Network Found.*, 22 F.3d 1423 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 500 (petition of AETC); 115 S.Ct. 1962 (1995) (petition of Forbes). In November 1992, he amended his complaint to challenge the decision of two private networks not to air one of his anti-abortion advertisements except during "safe harbor" hours. 22 F.3d at 1427. Only the First Amendment issue is now before this Court.

Congressional District seat, live tonight at 7:00, AETN, where learning never ends.

Joint Appendix (J.A.) at 135.

Forbes then filed suit and moved for a preliminary injunction ordering his inclusion in the October 22nd debate. The district court denied his motion, relying on the then-governing Eighth Circuit precedent of *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), which had rejected a political candidate's First Amendment claim of access to a televised campaign debate sponsored by a government broadcaster. *See Forbes v. Arkansas Educational Television Network Found.* (*Forbes I*), 22 F.3d 1423, 1428 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 500 (petition of AETC); 115 S.Ct. 1962 (1995)(petition of Forbes). The district court subsequently dismissed Forbes' complaint for failure to state a claim. *See Forbes v. Arkansas Educational Television Comm'n* (*Forbes II*), 93 F.3d 497, 500 (8th Cir. 1996).

The Eighth Circuit reinstated the First Amendment claim on appeal, overruling *DeYoung* in part. Specifically, the Eighth Circuit held that, if the facts showed that AETN had created a "limited public forum" for the televised debate, "then Forbes would have a First Amendment right to participate" and "could be excluded only if AETN had a sufficient government interest." *Forbes I*, 22 F.3d at 1429. The court further held that "if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights," even if the state-sponsored debate were a "nonpublic forum." *Id.* The case was remanded for factfinding on these two issues.

On remand, the case was tried to a jury, which found in response to special questions that AETN's decision to exclude Forbes was neither "the result of any political pressure coming from outside the professional staff of AETN," nor a product of "disagreement with his opinions." *Forbes II*, 93

F.3d at 501. Based on these answers, the district court found no viewpoint discrimination. Since the court had also ruled as a matter of law that the debate was a nonpublic forum, it entered judgment for AETN. *Id.*

The Eighth Circuit again reversed. Although approving the district court's handling of the viewpoint discrimination issue, it took issue with the trial judge's determination that AETN had not created a limited public forum when it sponsored the televised debate. Citing *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. __, 115 S.Ct. 2510 (1995), and *Widmar v. Vincent*, 454 U.S. 263 (1981), the court of appeals found that the debate was a limited public forum because AETN, "by staging the debate, opened its facilities to a particular group -- candidates running for the Third District Congressional seat." *Forbes II*, 93 F.3d at 504.[3] Emphasizing that "we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment," *id.*, the Eighth Circuit then held that the exclusion of Forbes was unconstitutional.

SUMMARY OF ARGUMENT

This case presents the narrow question whether a government-owned and operated broadcast network's ordinarily broad discretion to make editorial decisions must give way to First Amendment interests when the network sponsors a campaign debate among ballot-qualified candidates for political office, but excludes one such candidate on the ground that network executives do not consider his candida-

[3] Because the historical facts were not in dispute, the Eighth Circuit treated the limited public forum question as one of constitutional fact appropriate for *de novo* review under *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). *See Forbes II*, 93 F.3d at 502-03.

cy "viable" and believe that the public would be "best served" by not hearing his views. Accordingly, the case presents no occasion to question a government broadcaster's general authority to make programming decisions, advance some points of view, and exclude others. Still less does it raise any issue regarding access by outsiders to programs produced and aired by *private* broadcasters, whether for-profit or nonprofit, and regardless of whether they receive government funds.

A candidate's debate sponsored by a government broadcaster is different from almost all other television programming not only, as we argue below, because the debate constitutes a limited public forum for speech by the small, easily defined class of ballot-qualified candidates, but because the stakes are particularly high. As this Court has repeatedly noted, the First Amendment has "its fullest and most urgent application" to speech by candidates in a political campaign. *Buckley v. Valeo*, 424 U.S. 1, 15 (1974) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Because the inevitable consequence of a decision by government broadcasters to exclude a ballot-qualified candidate will be to diminish that candidate's visibility, deprive the public of an opportunity to hear his views, "skew the debate" toward mainstream, conventional ideas, and accordingly distort the democratic process, the Court should recognize a narrow, First Amendment-based exception in these circumstances to the general proposition that government broadcasters have editorial discretion to determine the nature and viewpoint of their programming.

The Eighth Circuit thus correctly ruled that AETN's sponsorship of the candidates' debate created a limited public forum. Unlike most programming on a government-owned television station, which is simply not a forum for speech by the general public, a televised debate for a particular political office is by its nature a forum created for po-

litical advocacy by a particular class of speakers -- here, ballot-qualified candidates for that office. AETN intentionally opened this program to a limited class of ballot-qualified candidates, and the program was completely "compatib[le] with [their] expressive activity." *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 802 (1985).

The Eighth Circuit erred, however, in concluding that the exclusion of Forbes was not viewpoint-based. Although the jury found that AETN did not reject Forbes because of hostility to his views or outside political pressure, the network's very conclusion that he was not "viable" and that the public was "best served" by not being exposed to his ideas was fundamentally viewpoint-discriminatory because it represented a judgment that nonmainstream or controversial opinions are not worth hearing. Thus, regardless of the nature of the forum created by a government-sponsored candidates' debate, AETN's exclusion of Forbes on the basis of perceived nonviability or unpopularity violated the strong First Amendment command of viewpoint neutrality.

The rejection of Forbes was also, as the Eighth Circuit ruled, fundamentally unreasonable "in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806. It vests too much discretion in state employees -- even when they are journalists -- to permit them to exclude a ballot-qualified candidate from a televised debate based on their perception that hearing the candidate's views will not be in the best interests of the public. Indeed, such an exclusion contravenes AETN's own educational purpose because it deprives the public of political information and ideas in the important context of an electoral campaign.

Recognizing the existence of a limited public forum here, and acknowledging that the exclusion of Forbes was both unreasonable and viewpoint-based, will not interfere

with the otherwise broad discretion of government broadcasters to determine the nature and quality of their programming. This case turns on two relatively unique facts: the creation of a forum and the context of an election. When these facts are not present, a state-owned broadcasting station resembles in many respects a public library, a public museum, or even a public university -- entities owned and financed by government, yet vesting substantial editorial discretion in the professional employees who decide what literature, art, or educational materials will be communicated. Under other circumstances, therefore, the professional decisions of these employees are themselves entitled to First Amendment protection -- as, for example, when a state-employed university professor resists forced loyalty oaths or other infringements of academic freedom. However, as the present facts demonstrate, these employees are *also* state actors, and in some cases can violate the First Amendment rights of others.

ARGUMENT

I. GOVERNMENT BROADCASTERS ARE GENERALLY ENTITLED TO BROAD PROGRAMMING DISCRETION AND GOVERNMENT BROADCAST NETWORKS SHOULD NOT BE REGARDED, FOR MOST PURPOSES, AS A FORUM FOR SPEECH BY MEMBERS OF THE PUBLIC

The question of whether and how the First Amendment applies to a government agency that operates a broadcast network is a complex one. On the one hand, it is clear that the First Amendment "protects the press *from* governmental interference; it confers no analogous protection *on* the Government." *Columbia Broadcasting System v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973)(emphasis in original)

(Stewart, J., concurring). At the same time, the care that AETN has taken to establish its editorial integrity undoubtedly reflects important First Amendment values, including the right of the public to receive information free from partisan political constraints. *See Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). As AETN's Programming Policy makes clear, the network asserts a high degree of editorial independence and does not view itself as simply a propaganda arm of the state. *A fortiori*, this is true of the journalists employed by AETN.[4]

Accordingly, *amici* agree with the observation of the plurality in *Muir v. Alabama Educational Television*

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[4] Their status as public employees does not divest them of their First Amendment rights. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Moreover, government-employed professionals working in traditional realms of intellectual inquiry and free expression, such as libraries or public universities, have heightened constitutional protection. *E.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957); *id.* at 262-63 (Frankfurter, J., concurring); *Keyishian v. Board of Regents*, 385 U.S. 589, 602 (1967).

This does not mean, however, that a government broadcast agency itself has First Amendment rights, as AETN argues. Petitioner's Brief at 42-46. AETN's error is to confuse the free speech and academic freedom rights of public employees *vis-a-vis* the agencies that employ them with management decisions of the government agencies themselves.

Because AETN and AETC are unquestionably agencies of state government, this case does not raise the question whether government-created private entities like the Corporation for Public Broadcasting or the Legal Services Corporation may in some circumstances have First Amendment rights. *Cf. Lebron v. National Railroad Passenger Corp.*, 513 U.S. __, __, 115 S.Ct. 961, 970 (1995).

Comm'n, 688 F.2d 1033, 1041 (5th Cir. 1982)(*en banc*), *cert. denied*, 460 U.S. 1023 (1983)(rejecting a First Amendment challenge to the cancellation of a controversial program), that government broadcasters generally should have the same ability "to make free programming decisions as their private counterparts." As Judge Rubin explained in a separate concurring opinion (joined by Judges Politz, Randall and Williams):

> The function of a state agency operating an informational medium is significant in determining first amendment restrictions on its actions. State agencies publish alumni bulletins, newsletters devoted to better farming practices, and law reviews; they operate or subsidize art museums and theater companies and student newspapers . . . . The first amendment does not dictate that what will be said or performed or published or broadcast in these activities will be entirely content-neutral. In those activities that, like television broadcasting to the general public, depend in part on audience interest, appraisal of audience interest and suitability for publication or broadcast inevitably involves judgment of content.

Id. at 1050.[5]

Thus, even though a government agency, AETN retains editorial discretion in most circumstances to design programming that it believes is educational and valuable without oversight by the judiciary or any other branch of government.[6] Properly understood, most of a government broadcaster's programming decisions simply do not fit within traditional forum analysis because the broadcaster has not ceded its platform to outside speakers. *Compare Lamb's*

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[5] The difficulty of defining exactly how AETN fits in the broad and diverse category of government speech is exemplified by the conflicting positions taken by AETN itself (Pet.Br. at 44, arguing that AETN is actually *adversarial* to the state), and the *amici* States of California, *et al.* (arguing that government is always the speaker where it owns and operates the broadcast entity).

[6] Although they have substantial editorial discretion, government-owned broadcast stations are *not* equivalent for constitutional purposes to private nonprofit broadcasters that simply receive some degree of government financing. First, unlike private nonprofits, government broadcasters are state actors, with constitutional obligations of their own. Second, private broadcasters have full First Amendment rights, whereas any First Amendment interest in government broadcasting would inhere in its employees, not in the agency itself (see note 4, *supra*).

AETN and some of the *amici* attempt to obscure any distinction between the private and the government-operated press by broadly citing *Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364 (1984). *FCC v. League*, however, involved the First Amendment rights of *private* noncommercial broadcasters. *Id.* at 393-95. The present case, by contrast, concerns only the obligations of government agencies holding broadcast licenses in those limited situations when they open up a forum for qualified electoral candidates. Thus, the fear of the *amici* Association of American Public Television Stations (AAPTS) that affirmance of the Eighth Circuit's judgment would have dire effects on private broadcasters is misplaced.

Likewise, the Federal Communication Commission's concern that an affirmance here would undermine the overall editorial independence that it expects from its licensees is misplaced. Moreover, it is oddly illogical, considering the controls that the agency itself exerts over programming content, and not only with respect to campaign coverage. *E.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); FCC Brief at 3-4 (broadcasting must be responsible to "identified needs of the community"); *id.* at 6 (under 47 U.S.C. §315(a) as currently interpreted by the Commission, FCC decides whether broadcaster qualifies for exemption from candidate access requirement based on its assessment of "reasonableness" and "good faith" of broadcaster's decision).

Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). Even invited guests who appear on a program generally do so within a format over which the broadcaster retains editorial control.[7]

But because AETN is a government agency, it is also bound by the First Amendment, and once it exercises its discretion to create a forum for qualified political candidates it must bear the constitutional consequences of its decision.[8] Despite disagreements over the outcome, the various opinions in *Muir* accepted the principle that government broadcasters may be subject to First Amendment constraints in appropriate circumstances. *See* 688 F.2d at 1050 (Rubin, J., *et al.*, concurring)(different First Amendment requirements exist when state is "conducting an activity that functions as a marketplace of ideas" than when it "is devoted to a specific function" such as publishing a military newspaper or holding a press conference); *id.* at 1053-60 (Johnson, Hatchett, Anderson, Tate, and Thomas A. Clark, JJ., dissenting) (government broadcaster's cancellation of already scheduled program because of political pressure should be seen as unconstitutional); *id.* at 1060 (Reavley, J., dissenting)(government broadcaster has editorial discretion, but may not make decisions based upon "viewpoint alone"). Even the court in *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 489 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 71 (1991), although denying the First Amendment claims of two candidates excluded from state-sponsored television debates, noted that "the use of state instrumentalities to suppress unwanted expressions in the marketplace of ideas would authorize judicial intervention to vindicate the First Amendment."[9]

This Court has also recognized that state actors have constitutional obligations to the public when they publish, broadcast, distribute literature, or otherwise engage in the business of communicating ideas. In *Board of Education v. Pico*, 457 U.S. at 870-71, a plurality held that the First Amendment limits the power of local school boards to remove books for ideological reasons.[10] Other courts have

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[7] It is certainly possible that AETN or other government broadcasters could transform some of their programs (other than political campaign debates) into fora for speech by at least some members of the public by inviting them to participate on a viewpoint-neutral basis. However, there are not many programs other than a campaign debate that could easily be classified as a *limited public forum*. Indeed, it is difficult to imagine other contexts in which the "class of speakers" entitled to access would be so readily identifiable, and in which the "nature of the [program]" would be so clearly "compatib[le] with expressive activity" by members of that class. *Cornelius*, 473 U.S. at 802 (*see* Point II, *infra*).

[8] Because AETN is part of Arkansas' state government, it is different not only from private broadcasters but from other private debate sponsors. *Compare Perot v. Federal Election Comm'n*, 97 F.3d 553, 558 (D.C.Cir. 1996), *cert. denied*, __ U.S. __, 65 U.S.L.W. 3753 (1997).

[9] A scholar has suggested that where government broadcasters have clearly delineated lines of editorial decisionmaking, outside political interference "by the governing board or other public official would be as objectionable in first amendment terms as similar intervention by a university president . . . in the case of a state university press." William C. Canby, Jr., "The First Amendment and the State as Editor: Implications for Public Broadcasting," 52 Tex.L.Rev. 1123, 1164 (1974). *Cf.* David Cole, "Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech," 67 N.Y.U.L.Rev. 675 (1992) (proposing "spheres of neutrality" where government funds universities and other traditional fora for free expression).

[10] A concurrence by Justice White, who provided the fifth vote in *Pico*, implicitly assumed that some reasons for library book removal would violate the First Amendment, 457 U.S. at 883, as, indeed, three of the dissenters stated explicitly as well. *Id.* at 907 (Rehnquist, Powell, and Burger, JJ., dissenting).

come to like conclusions as they have struggled to balance the competing claims of the public and of government decisionmakers in dealing with government-disseminated speech.[11] *E.g.*, *Serra v. General Services Admin.*, 847 F.2d 1045, 1048-49 (2d Cir. 1988)(citing *Pico*)(even with respect to government-owned artwork, "there are conceivably situations in which the Government's exercise of its discretion . . . could violate the First Amendment rights of the public . . . [I]t is possible that the Government's broad discretion to dispose of its property could be exercised in an impermissibly repressive partisan or political manner"); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 381-82 (5th Cir. 1989)(even though state-owned bar journal has editorial independence, it is nevertheless bound by First Amendment, so that decisions must be reasonable and viewpoint-neutral); *Bryant v. Secretary of the Army*, 862 F.Supp. 574 (D.D.C. 1994)(rule banning writings "not in consonance with policies of the Department of the Army" in "personal commentary" section of military publication is unconstitutionally viewpoint-based); *Aldrich v. Knab*, 858 F.Supp. 1480, 1490-94 (W.D.Wash. 1994)(state university-owned radio station had opened itself as nonpublic forum to speech by volunteers and thus could make general editorial decisions but not discriminate based on speakers' viewpoints).

As in *Pico*, *Serra*, *Estiverne*, *Bryant*, and *Aldrich*, so here, the problem is to reconcile the government-employed speakers' discretion with the public's First Amendment right

[11] On the problem of reconciling the editorial independence of government-employed speakers with the First Amendment rights of members of the public, *see* Mark G. Yudof, WHEN GOVERNMENT SPEAKS (1983); Steven Shiffrin, "Government Speech," 27 U.C.L.A. L.Rev. 565 (1980); Marjorie Heins, "Viewpoint Discrimination," 24 Hastings Con.L.Q. 99, 150-57 (1996).

to receive relevant information about a political campaign, and the candidate's First Amendment right to avoid discriminatory exclusion from a government-sponsored debate. Given that the First Amendment has "its fullest and most urgent application" to political campaign speech, *Buckley v. Valeo*, 424 U.S. at 14-15, the balance in this case must tilt in favor of Forbes and the public. As Judge Clark noted in *Chandler*,

> For the state to set up . . . a debate and exclude certain candidates not only puts its stamp of approval on the favored candidates, it also "curtail[s] access to ideas" by preventing the ideas and information that would be produced through the debating candidates' interaction from coming to light.

917 F.2d at 493-94 (Clark, J., dissenting).[12]

[12] Judge Clark's elaboration in this passage of the difference between campaign debates and other government broadcasting is instructive:

> [T]he decision to show or not to show a particular program or documentary and the ideas contained therein is very unlike the decision to exclude political parties from a debate. The positions put forward in a particular television program may find equally effective expression through a wide variety of media. I would not contend, therefore, that when the state shows a documentary it must include all viewpoints in that documentary. But an idea is not a candidate, and freedom of speech has greater meaning in the election arena. There is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. A debate serves to inform the public far more effectively than any candidate's lone appearance could, by creating a synergism between the candidates' immediately conflicting positions.

917 F.2d at 493 (Clark, J., dissenting).

II. WHEN A GOVERNMENT BROADCASTER SPONSORS AND AIRS A POLITICAL CAMPAIGN DEBATE, IT CREATES A LIMITED PUBLIC FORUM FOR SPEECH BY BALLOT-QUALIFIED CANDIDATES

In this case, AETN's editorial discretion was limited by its creation of a limited public forum for speech by candidates for the Third Congressional District.[13] That is, the televised debate was not like most AETN programs, in which the government broadcasters frame the subject matter and decide what viewpoints will be heard. Instead, for purposes of the debate AETN essentially turned the microphone over to the candidates. As Judge Clark perceived in *Chandler*, so here, AETN "already decided to give over its airwaves to political contenders for [elected] office[]." 917 F.2d at 493 (Clark, J., dissenting).

This Court ruled in *Cornelius* that two factors guide the determination whether a state agency has opened a limited forum for citizens' speech: first, the agency's intent "to designate a place not traditionally open to assembly and debate as a public forum" and, second, "the nature of the property and its compatibility with expressive activity." 473 U.S. at 802. AETN's candidate debate satisfies both of these requirements.

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[13] The forum at issue here is the debate, not AETN as a whole. *See, e.g., Cornelius*, 473 U.S. at 801 ("in defining the forum we have focused on the access sought by the speaker"); *Lebron v. National Railroad Passenger Corp.*, 69 F.3d 650, 655-56 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2537 (1996)(same). Thus, the majority in *Chandler* erred when it assumed (without discussion) that forum analysis is an all-or-nothing proposition in which either the entire network is a "pure marketplace of ideas," or the state has total discretion as to *all* programming decisions. 917 F.2d at 488. Similarly, AETN and its *amici* err to the extent that they focus on the government network's programming as a whole rather than the one debate that is at issue.

First, by sponsoring the debate AETN opened to ballot-qualified candidates a forum (a TV program) that is not generally available for members of the public. The fact that this was a forum so limited that only three people qualified does not change its nature,[14] for Forbes was certainly in the "class of speakers" for which the forum was designed. As the Second Circuit explained in *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991), "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities *of a certain genre*, it may not selectively deny access for other activities of that genre" (emphasis added). *See also Estiverne*, 863 F.2d at 378 n.10 (in limited public forum, medium "must at least be designed to provide a vehicle for expressive activity by the class of speakers claiming access"). Thus, the Eighth Circuit properly ruled that AETN could not, "simply by its own ipse dixit, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation." *Forbes II*, 93 F.3d at 504. Or, as this Court reiterated in *Rosenberger*, 115 S.Ct. at 2517, "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set."[15]

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[14] Designated public fora usually are limited in their scope. As the Court explained in *Cornelius*, 473 U.S. at 803, the designated forum recognized in *Widmar v. Vincent*, 454 U.S. 263, was limited to meeting places for student expression; the forum in *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976), was limited to topics on the local school board meeting agenda. *See also Perry Educational Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 n.7 (1983)("[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects")(citing *Widmar* and *Madison*).

[15] Indeed, if the law were otherwise, this Court's distinction between

(continued...)

The televised debate was also a limited public forum because of "the nature of the property and its compatibility with expressive activity" by all three candidates. *Cornelius*, 473 U.S. at 802. As noted, as a ballot-qualified candidate Forbes was a member of the limited class whose campaign speech was compatible with the forum that AETN created. Indeed, AETN's advertisement created the impression that all candidates were included -- "Do you know your candidate? Get better acquainted with the candidates and the issues . . . ." (J.A. 135) -- while falsely implying that the Republican and Democratic nominees were the *only* available choices.

AETN and its *amici*, making a great issue of Forbes' limited support and shoestring approach to campaigning, argue essentially that AETN can redefine the forum to include only "serious" or "viable" candidates.[16] But the State of Arkansas had already determined Forbes' viability by certifying that he was ballot-qualified. In rejecting Forbes, AETN in essence made a judgment that his ideas were not worth hearing despite his ballot-qualified status -- a judgment that condemned him to marginality, and that government agencies should not make even under the guise of journalistic discretion. For, as scholars have observed with respect to independent candidacies, "[t]he prophecy that a candidate cannot win is self-fulfilling." Steven J. Rosenstone, Roy L. Behr, & Edward Lazarus, THIRD PARTIES IN AMERICA 39 (2d ed. 1984). Because state broadcasters, like public schools and other government agencies, have unique potential for manufacturing consent, indoctrinating, and controlling access to ideas,[17] there is particular danger of skewing the political process in favor of the status quo when a government agency decides that the public would be "best served" by hearing only the views of the major parties.

Ultimately, the "nature of the forum" is compatible with expressive activity by all three candidates because of the political and historical importance of independent parties in electoral campaigns. Independent and third party candidates have long been gadflies, challengers, and question-raisers. This Court has noted that "[h]istorically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the mainstream," *Anderson v. Celebreeze*, 460 U.S. 780, 794 (1983); and that "[a]ll political ideas cannot and should not be channeled into the programs of the two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were

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[15] (...continued)
limited public fora and nonpublic fora would collapse. In both instances, government has provided some opportunity for expression by members of the public on government property or in government-controlled media that otherwise are not open for citizen speech of any sort. In nonpublic fora, government can impose restrictions on citizen speech so long as they are reasonable and viewpoint-neutral. In limited public fora, the same rules apply; the only difference is that government cannot for any reason, whether viewpoint-based or not, exclude speakers who are otherwise within the class or genre for which the forum was designated. If AETN may constitutionally exclude Forbes, who as a ballot-qualified candidate for Congress was clearly within the class or genre of speakers encompassed by the candidates' debate, then the limited public forum category ceases to have any meaning separate from the nonpublic forum.

[16] Forbes had in fact won 13.8% of the vote in the Republican primary runoff for Lieutenant Governor in 1990 (J.A. 145).

[17] *See* Yudof, WHEN GOVERNMENT SPEAKS xv, 200-11.

ultimately accepted." *Sweezy v. New Hampshire*, 354 U.S. at 250-51.

This process of challenging the comfortable views of the major parties and forcing mainstream candidates to confront questions that they might otherwise ignore is critical to the process of peaceful social change. Third parties have a unique capacity "to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored." Rosenstone, *et al.*, THIRD PARTIES IN AMERICA at 8. History thus belies any notion that a ballot-qualified candidate's relative lack of immediate electoral "viability" makes his participation in a government-sponsored debate "incompatible" with the nature of the forum.[18]

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[18] It also cannot be a sufficient argument against finding the debate to be a limited public forum that accommodating independent candidates might prove logistically unwieldy. For example, the numbers cited in the AAPTS Brief at 14-15 regarding presidential and other candidates appearing on ballots in recent years are misleading to the extent they suggest that a flood of idiosyncratic or unimportant candidates are crowding ballots throughout the land. Twenty-three presidential candidates appearing on the ballot in at least one state hardly amounts to 23 aspirants seeking to participate in debates in every state. In the present case, there were only three ballot-qualified candidates for the Third District seat. In the rare situations where an unmanageable number of candidates have qualified for the ballot, the government broadcaster can surely evolve reasonable content-neutral time, place and manner rules so that cacophony does not result. *See, e.g., McGlynn v. New Jersey Public Broadcasting Auth.*, 88 N.J. 112, 129, 439 A.2d 54, 62 (1981)(statutory access provision permits government broadcaster flexibility to determine the manner in which candidates will debate if the number is unwieldy).

Moreover, claims that major party candidates will refuse to debate minor party ones are both speculative and insufficient to establish a compelling interest in suppressing nonmainstream political voices. Indeed, this "major candidate veto" argument is akin to the "heckler's veto" argument that has rarely been considered a legitimate basis for restricting unpopular speech.

As this Court has often recognized, political campaign speech is at the heart of the First Amendment. *See, e.g., Buckley v. Valeo*, 424 U.S. at 14-15; *Mills v. Alabama*, 384 U.S. 214, 218 (1966)("a major purpose" of First Amendment "was to protect the free discussion of governmental affairs , . . . of course includ[ing] discussions of candidates"). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. __, __, 115 S.Ct. 1511, 1519 (1995). AETN's debate program was a limited public forum most fundamentally because at the very heart of our democracy is the principle that all ballot-qualified candidates for political office should be heard, and therefore that a government broadcaster cannot close a campaign debate to those aspirants whom it deems unsuitable, or whose ideas it thinks most voters will not take seriously.

III. REGARDLESS OF THE NATURE OF THE FORUM CREATED BY AETN, ITS EXCLUSION OF FORBES WAS UNCONSTITUTIONALLY VIEWPOINT-BASED AND NOT REASONABLY RELATED TO THE PURPOSE OF THE DEBATE

As *Perry Educational Ass'n*, *Cornelius* and, mostly recently, *Rosenberger* have made clear, even when a forum for citizen speech is "nonpublic," a government decision to deny access must be both "reasonable in light of the purpose served by the forum" and "viewpoint-neutral." *Cornelius*, 473 U.S. at 806. AETN's decision to exclude Forbes was neither. Since the televised debate was at the very least a "nonpublic forum" for ballot-qualified candidates, the exclusion of Forbes was unconstitutional regardless of how the

Court ultimately characterizes the debate for purposes of forum analysis.

A. Deciding That a Ballot-Qualified Candidate Is Not Viable Or That The Public Will Be "Best Served" By Excluding Him From A Debate Is Viewpoint Discrimination

This Court in *Rosenberger* held that a public university's denial of student activity funding to a publication that promoted a "religious perspective" was unconstitutionally viewpoint-based. 115 S.Ct. at 2518. The Court rejected a narrowly "bipolar" definition of viewpoint discrimination in favor of a more realistic understanding that public debate is by nature "complex and multi-faceted," and that discrimination against whole categories of ideas can "skew" that debate "in multiple ways." *Id. See also Lamb's Chapel v. Center Moriches*, 508 U.S. at 390-91.

The *Rosenberger* ruling is consistent with numerous precedents condemning discrimination against ideas or speakers because they are deemed "dangerous," unpopular, or controversial. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. at 1519 (controversial political viewpoints are "the essence of First Amendment expression"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989)(government may not prohibit expression of ideas simply because they are disagreeable); *Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 537-38 (1980)(rejecting argument that government can constitutionally restrict both sides on "controversial issues of public policy"; "[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983)(government may not discriminate in subsidy or benefit programs "in such a way as to '[aim]

at the suppression of dangerous ideas'")(quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959), and *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).[19]

The Eighth Circuit thus understood the concept of viewpoint discrimination too narrowly. Viewpoint discrimination occurs not only when a government agency acts, in a "bipolar" sense, out of hostility to a particular point of view, but when it disfavors a minority perspective on a given subject because it is unpopular, marginal, controversial, or otherwise not deemed to "best serve" the viewing public. As Judge Clark observed in *Chandler*, excluding minor party candidates based on judgments about the best interests of the voters amounts to viewpoint discrimination because it derives from a belief that "the viewpoints of the Libertarians [are] less valuable than those of the Democrats and Republicans." 917 F.2d at 491-92 (dissenting opinion). So here, as the Brief *Amici Curiae* of the States of California, *et al.*, in fact acknowledges, excluding Forbes "convey[ed] the message" of the government that his candidacy was not worthy of attention. AETN's disqualification of Forbes was viewpoint discriminatory because it arose from a bias favoring the status quo, valuing major over minor party candidates and ideas, and *de*valuing the uninhibited and wide-ranging political debate that the First Amendment contemplates.

B. Excluding Forbes was Unreasonable in Light of the Forum's Purpose

AETN's decision to exclude Forbes based on its judgment that he was not a viable candidate, and that the public would not be "best served" by hearing his views, was also

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[19] On the viewpoint discriminatory nature of government actions that disfavor controversial or unpopular ideas, *see* Heins, *Viewpoint Discrimination*, 24 Hastings Con.L.Q. 99.

unreasonable in light of the purpose of a televised debate. As noted above, judgments about a candidate's viability or likelihood of success too often become self-fulfilling prophecies. Moreover, minor party candidates raise issues that the more mainstream candidates would otherwise ignore. *See* Point II, *supra*. Thus, the fundamental purposes of a political debate among qualified candidates are ill-served when government excludes those holding opinions that are considered controversial, unpopular, or radical.[20]

Forbes' exclusion was particularly unreasonable in light of AETN's own policy commitment to "further the goals of a democratic society by enhancing public access to the *full range of ideas and viewpoints required for citizens/voters to make informed judgments* about the issues of our time." Cert.App. 100a (emphasis added). The network violated this provision of its own Programming Policy when it took it upon itself to decide that the voters were "best served" by not hearing the views of one of the contest's ballot-qualified candidates. Judged by its own standards, therefore, AETN's decision was unreasonable.

The Court of Appeals for the Fourth Circuit observed in *Multimedia Publications v. Greenville-Spartanburg Airport*, 991 F.2d 154, 159 (4th Cir. 1993), that the reasonableness of speech restrictions in a nonpublic forum should be scrutinized with some care because "protected First Amendment activity" is at stake. The court accordingly struck down a local airport's ban on newsracks because none of the reasons

[20] Nor does the FCC's current interpretation of 47 U.S.C. §315(a), exempting broadcaster-sponsored campaign debates from the statute's access requirements, establish that AETN's decision was reasonable for First Amendment purposes. As the AAPTS Brief notes, at 11-12, the FCC's construction has changed at least twice since §315(a) was enacted.

asserted to support it was persuasive. AETN's paternalistic judgment that it knew what was "best" for the voters of the Third District is equally unpersuasive, and was as unreasonable in relation to the purpose of a campaign debate as was the Greenville-Spartanburg Airport's newsrack ban in *Multimedia* or, for that matter, the Los Angeles Airport's decision to prohibit all First Amendment activity in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

The court of appeals in this case accurately summarized the unreasonableness of AETN's action:

> AETN itself characterizes the criteria it used as . . . "essentially subjective" . . . . In a sense, the State of Arkansas had already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican . . . and Democratic nominee. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication . . . .
>
> The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

Forbes II, 93 F.3d at 504-05.

AETN and its *amici* make exaggerated claims that the sky will fall on all editorial discretion for all noncommercial broadcasters if the Eighth Circuit's judgment is affirmed. But invalidating AETN's decision to exclude Forbes from its televised campaign debate will not interfere with the net-

work's journalistic control over the great bulk of its programming, will have no effect at all on the nongovernmental press, and represents a constitutionally proper balance between the editorial needs of government broadcasters and the First Amendment rights of the public and of nonmainstream candidates to an "uninhibited, robust, and wide-open" exchange of political views in a government-sponsored forum. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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UNITED STATES SUPREME COURT

October Term 1996

The Arkansas Educational Television Commission , et al

Petitioner

-against-

Ralph P. Forbes

Respondent

On writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of Amicus Curiae, Eugene McCarthy & Larry Agran

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HIGHLIGHT OF ARGUMENTS. EXCLUSION FROM DEBATES DEFEATS A CANDIDATE, CONVEYS FALSE MESSAGES, AND DENIES VOTERS OF CHOICE

Amici, McCarthy and Agran, submit this brief (on consent of both parties) as candidates whose presidential primary campaign's were destroyed by being excluded from televised debates. We have an action below to establish such rights. We file this because of the effects your decision here may have on presidential primaries. While we urge affirmance here, we submit that the "public forum" holding of the Circuit Court on the first appeal, which limited communication rights solely to public television, is wrong. A major debate on ABC[1], we were excluded from, was simultaneously carried on public television and rebroadcast by public TV in subsequent State primaries.

The fact is, that today : 1. a decisive portion of the electorate make up their minds on how they will vote by watching candidates debates and 2.. There is no alternate effective means of communication. We do not have to argue that participation in televised debate is directly a "right per se". For it is such, as a consequence of the electorates right to intelligently cast their ballot and the nation's need for deliberative, comparative selection, which is what elections are for. It is not a free election nor any election when, as most often occurs, voters enter the polling booth and find on the ballot, names they never heard from or about, or were able to and were accordingly unable to intelligently choose between them. And this Court has held that free and fair elections are a Constitutional right[2]. (See Point I)

Secondly, we submit that a candidate has a First Amendment right to communicate; as has his rival. That a right to simultaneously speak, results in neither being heard and since the rights of the electorate are paramount, the right should be accorded in a manner most conducive to the deliberative process (i.e. counsel here is not denied free speech rights by having to sit silent during his adversaries presentation). (See Point II).

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[1] The public official sponsoring this debate held at a public college with public funds testified that ABC's president insisted on our exclusion

[2] United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368; and Anderson v. U.S. 417 U.S. 211, 94 S.Ct. 2253 (U.S.W.Va. 1974)

Thirdly, exclusion violates the neutrality principle and carries a negative message that the unheard ideas of the excluded candidate are too extreme, radical, uninformed, or stupid etc. for him/her to be included. That such a vote will be wasted. (Media never attempts to neutralize this). Nor is the excluded effectively able to rebut this, adding to his other disabilities. (See Point III)

Fourthly, because free elections is at the core of our Constitution, Government cannot be permitted to give away an exclusive license (a legal oxymoron) to all of the publicly owned airwaves to broadcasters, for nothing and require candidates to buy pieces back at enormous sums. The model of New York Times Company, v. L. B. Sullivan, Ralph D. Abernathy et al.,[3] is instructive in that this Court reversed because of the perceived effect on what you viewed the First Amendment ought to produce; vigorous and robust debate. The true historic reason for "free speech" and "free elections"; to substitute reason and deliberativeness for force, should be similarly treated. A contrary holding requires anyone seeking to promote a candidate for the Presidency, to seek the permission of the press and media. Otherwise, as happened in our case, they will be a non-candidate.

The danger from such repression, beyond the violence it can produce, is the current widespread public apathy, drop in voter turnout, participation and interest, induced by feelings of powerlessness. This is caused by the high cost of television for campaigning, the resulting need for big contributions to buy time, and the perceived "quid pro quo" to the contributors. That savvy people do not repeat such large giving, without a reward. Such is the pathway to Dictatorship, corruption and worst.

OUR FACTS ILLUSTRATE THE BROADER ISSUES HERE

Amici were two out of four candidates in most of the Democratic Party primary elections in 1992, in which there was a total information blackout to the voters, in press and media, about their candidacies. Even as to the fact that their names appeared on the machine as presidential candidates. It resulted in each getting less than 1% of the vote; withdrawn candidates getting more. Media conveyed to the electorate that there were no

[3] 376 U.S. 254, 84 S.Ct. 710, 95 A.L.R.2d 1412, 11 L.Ed.2d 686, 1 Media L. Rep. 1527 (U.S.Ala. 1964)

such candidates. Voters could find out virtually nothing about them, nor knew they existed; not till too late, after closing the voting booth curtain and seeing four levers, instead of the two they were led to expect. This, despite the fact that, as in New York, hundreds of volunteers had gone door to door statewide, in the snowy cold winter and collected thirty thousand signatures that made them ballot qualified candidates. Agran had been endorsed by an 85% vote of the Reform Democratic Clubs, Assembly, whose endorsement for 40 years has resulted in heavy primary majorities.

This Court[4] has given constitutional recognition to the right of the non-preferred candidates to get on the ballot and it is a cruel hoax, after great effort to put such names there, that the blackout made it an empty gesture. But for that blackout, we should have secured a majority of the New York delegates.

The Constitutional right of free and fair elections is the "sine qua non" of the Constitution, Forrest Mc Donald concluded in "Novo Ordo Seclorum --The Intellectual Origins of the Constitution" at page 287 .

DIRECT COMMUNUICATION FOR CANDIDATES IS NEEDED FOR FREE AND FAIR ELECTIONS

Those in control of the lines of communication have wrested the power of the electorate to nominate the President without "checks or balances" on that power. An academic study was made of our 1992 primary entitled "Getting on the Media Agenda--a Case Study in Competing Logics of Campaign Coverage" by Professor Joshua Meyrowitz,[5]. He concluded that the role free speech decisions ascribe to our media and press is unfulfilled. They do not provide the "market place of ideas", decisions say make fair elections. Their "free speech" smothers public's free elections rights. 'Free Speech" in their view, is a right of theirs, but not something they owe to the public.

[4] American Party of Texas v. White, 415 U.S. 767 94 S.Ct. 1296 (U.S.Tex. 1974) and , Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5,21 L.Ed.2d 24 (U.S.Ohio 1968) and progeny

[5] Professor of communications at the University of New Hampshire, which is Chapter 2, pg 35 et seq of " The Problem of Political Campaign Discourse," by Kathleen Kendall, SUNY Press, 1996.

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Reconciliation of competing commands of free speech and free elections is only thru direct communication with the electorate.

Meyrowitz says the media and press do not see their role as "informational", to permit the issues that confront Democratic primary voters to be debated by the candidates. Their zeal to sell newspapers and air-time causes reporters, in order to be printed by editors, to exclusively write about something they call "news". "News" is a form of "entertainment", which sees as "newsworthy", only the unique, the sensational and the bizarre. Thus "News", in election campaigns, analogizes elections to a "horse-race", in which only the "front runners" (usually two) are interesting enough to report about. "Ratpack-journalism" makes it even worst. It being unseemly for one broadcaster or newspaper to report the inaccuracy of another, they repeat and never contradict one another, falsehoods being repeated forever.

But this has nothing to do with the Democratic Party rules which provides for proportional representation in electing delegates; making the "horserace", as a model, nonsense. The effect of a slight margin of victory (say by a "nose-length") far from being "big news", is unimportant. Under Party rules, every vote is represented. A candidate receives delegates in proportion to the percentage of votes he received. Those delegates, added to delegates freed, when others drop out, or are unpledged, can produce a majority and nominate a President. A candidate able to toll 15%, has that vote preserved intact, through the Convention. We do not have "winner take all" primaries, the "horserace" paradigm is false, and as shown below, they knew it.

Amici was excluded from debates from the outset in New Hampshire, when Amici was high in the polls, which quickly ended that. But the results in rural New Hampshire is no test as to how Democratic voters in the inner cities or suburbs of New York will respond 3 weeks later. A candidate not placing first or second in New Hampshire in 1992, like Agran, who was organized and championing urban issues of strong appeal in New York, and won the delegate vote of 85% of the Reform clubs there, which historically assured a huge majority vote was, by any standards a more significant contender than Clinton. Nevertheless, he was still denied access to the debate and any press or Media in New York, which destroyed his campaign

thereafter. The 1992 New York voter was, by this blackout, given uncontradicted false information by and in a monopolistic denial of the right of free elections.

Other important choices were also foreclosed. In each primary, the delegates are elected to enact the rules for future delegate selection. Rules beyond the reach of State or State high courts,[6] that can improve the process next time, usually favored by non-lead candidates. They can influence, debate, shape platform, sit on committees, elect the national committee and even work out unity though November. Not an exciting incident of a "horserace", the electorate was blacked out from this too.

Many recent books argue that the current system of having the press serve as the sole intermediary between candidates and the electorate is the deathknell of our Democracy. A Harvard Kennedy Center study argues that, because of this, the electorate cannot be informed and primary elections[7] should end.

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[6] William Cousins et al., Petitioners, v. Paul T. Wigoda et al, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (U.S.Ill. 1975) and Tashjian v. Republican Party of Connecticut, 107 S.Ct. 544, 479 U.S. 208, 55 USLW 4057 (U.S.Conn. 1986)

[7] Out of Order, How the Decline of the Political Parties and the Growing Power of the News Media Undermine the American Way of Electing Presidents by Thomas E. Patterson, Professor Maxwell School, Syracuse Univ written as visiting Professor Harvard University, Kennedy School, Published by Alfred A Knopf 1993 . This was largely a study of the 1992 Presidential primary. He concludes that McCarthy's reforms to the primary process placement of the power of selection in the hands of the primary voters, involving the use of the press and media as an intermediary, was wrong in that the news media is ill suited to that purpose. Some others are:
Breaking The News, How the Media Undermine American Democracy by James Fallow, Publisher Vintage Press
By Invitation Only, How the Media Limit Political Debate by David Croteau and William Hoynes, Univ. of Richmond & Vassar College Publisher Common Courage, Monroe Maine, 1994

C-Span has had innumerable programs on this topic including those by Free TV For Straight Talk Coalition of Paul Taylor and Common Cause. A study in England shows how Rupert Murdock was able to engineer the election of Prime Minister Margaret Thatcher through his monopoly control over the press. Glascow Herald, Larry

POINT ONE

THE CORE OF OUR CONSTITUTION, GOVERNANCE THROUGH "REASON", WITH ELECTIONS AS ITS MEANS, REQUIRES VOTER SELECTION AFTER FULL DIRECT ACCESS TO INFORMATION FROM ALL CANDIDATES,

The holdings of United States v. Classic[8] and Anderson v. U.S.[9] are:

1. That there is a Constitutional right to free, and fair elections.
2. That this is a protection against anyone's interference, in any form not merely that by government.

United States v. Classic, supra holds:

> "It is no extension of the criminal statute, as it was not of the civil statute in Nixon v. Herndon, supra, to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression."

This was applied in Anderson v. U.S. supra where the interferors were not "state actors", but candidates for local office having no connection to government whatever. The Court said:

> "The right to an honest (count) is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.[Cases cited]

Elections are for converting "reason" into "governance" and not a "horserace". John Locke "invented" our form of government; "a republic", whose main binding force is "reason" (not physical force as in older forms). All branches to be chosen through "reason", and deliberativeness, in "free elections", selecting officials who, too, would operate through reason.

Lamb 5/24/95, Extra, Vol 8, No, 6, pg 16. There are many areas of this country today where candidates are at the mercy of the press.

[8] 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368,

[9] 417 U.S. 211, 94 S.Ct. 2253 (U.S.W.Va. 1974)

It's found in the Declaration of Independence's "consent of the governed" phrase, Tom Paine's Common Sense's discourse on voting and the following from Thomas Jefferson's Address to The Citizens of Albemarle County and a catalogue more:

> "...It rests now with ourselves alone to enjoy in peace and concord the blessings of self-government, so long denied to mankind; to shew by example the sufficiency of human **reason** for the care of human affairs and that the will of the majority, the Natural law of every society, is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived,--Let us then, my dear friends, for ever bow down to the general **reason** of the society. We are safe with that, even in its deviations, for it soon returns again to the right way..." [10] (emphasis supplied)

Article II, Section 1 of the Constitution did not originally mandate the election of the Presidential electors though it shortly became universal. Later amendments (the 20th, the 22nd, the 23rd and the 24th) treat it as required. The provisions for election under the Constitution is construed very broadly to achieve its purpose and thus includes primaries. In Tashjian v. Republican Party of Connecticut supra the term "election" of Congressman was held to include state primaries for federal office.[11]

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[10] Delivered on leaving Monticello to become Secretary of State under President George Washington 2/12/1790 Lib Cong 53:9021-2

[11] "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice," the requirements of Article I, Sec. 2, cl. 1, and the Seventeenth Amendment apply to primaries as well as to general elections. United States v. Classic, supra, at 318, 61 S.Ct., at 1039; see Smith v. Allwright, 321 U.S. 649, 659-660, 64 S.Ct. 757, 762-763, 88 L.Ed. 987 (1944). The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process. If primaries were not subject to the requirements of the Qualifications Clauses contained in Article I, Sec. 2 and the Seventeenth Amendment, the

Like a great many other terms in the main body of the Constitution, the term "election" can best be understood as the implementation of Locke's plan. Thinkers prior to him maintained that the legitimate source of "Law." was "God", that Kings, being the descendants of King David, articulated "Law" on behalf of God and that obedience to "law" had to be secured through "force". Locke argued in the words of the Declaration of Independence, that Governments are instituted among men by the consent of the governed and that governments are held together by "reason" and not "force"

"Elections" to Lockians, like Jefferson and Madison, was the process by which "deliberation" and "reason" was transformed into governance. The term "election" in the body of the Constitution could not derive its meaning from any of the bills of rights, simply because they hadn't been adopted yet. Therefor the word "election" wasn't dependent on nor derive its meaning from the First Amendment which is read as a restriction as to "state action". Madison tells the role of "reason" and "deliberativeness" in elections in his famous statement quoted in Harte-Hanks Communications, Inc. v. Connaughton[12] asserts:

> "..As Madison observed in 1800,[13] just nine years after ratification of the First Amendment:
>
> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the

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fundamental principle of free electoral choice would be subject to the sort of erosion these prior decisions were intended to prevent.

" [9] Accordingly, we hold that the Qualifications Clauses of Article I, Sec. 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections. ...."

[12] 109 S.Ct. 2678, 491 U.S. 657, 105 L.Ed.2d 562, 57 USLW 4846, 16 Media L. Rep. 1881 (U.S.Ohio 1989)

[13] [Ed. Actually made to the Virginia Legislature]

> candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, Debates on the Federal Constitution 575 (1861)."

Madisons answer to Jefferson's proposal on amending the constitution in Federalist Papers #49 is pertinent

> " But it is the reason, alone of the public, that ought to control and regulate the government." (emphasis supplied)

There is a major price to be paid for denial of that right of "free election" said Madison, as quoted in Board of Educ..Island Trees Union Free School Dist. No. 26 v. Pico, [14]

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Mr. Justice Brandeis went back to the Locke's thesis on the operation of "reason" in Whitney v. California [15] in paraphrasing John Locke thusly:

> "Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely

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[14] 102 S.Ct. 2799, 457 U.S. 853, 73 L.Ed.2d 435, 4 Ed. Law Rep. 1013, 8 Media L. Rep. 1721, (U.S.N.Y. 1982)

[15] 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095

supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." (Emphasis supplied)

As the term election is construed broadly, a free and fair election is one where there are no restrictions on that right. Oregon v. Mitchell, [16] this Court said:

"It was in that tradition that we said in Reynolds v. Sims, supra, 377 U.S., at 555, 84 S.Ct., at 1378, 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'

"This 'right to choose, secured by the Constitution,' United States v.Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, is a civil right of the highest order. Voting concerns 'political' matters; but the right is not 'political' in the constitutional sense."

And after years of the Courts expanding the "right of ballot access", (American Party of Texas v. White[17]) what a mockery it would be to tell a candidate, that after bearing the burden of collecting hundreds of thousands of signatures, his rights extended no further than having his name printed on the ballot, to be seen too late to do any good. Candidacies serves the purpose, not merely to "win" the election, but to cause other candidates to address issues. Anderson v. Celebrezze, [18] says:

"As we have repeatedly recognized, voters can assert their preferences only through

[16] 91 S.Ct. 26,0 400 U.S. 112, 27 L.Ed.2d 272 (U.S.Or. 1970).
[17] 415 U.S. 767 (1974))
[18] 460 U.S.780, 103 S.Ct. 1564.(U.S.Ohio 1983)

candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." Lubin v. Panish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." Ibid.; Williams v. Rhodes, supra, 393 U.S., at 31, 89 S.Ct., at 10. The exclusion of candidates also burdens voters' freedom [460 U.S. 788] of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens. (FN8)"

In CBS, Inc. v. F.C. C., [19] this Court said:

"It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market .... It is the right of the public to receive suitable access to social, political esthetic, moral, and other ideas and experience which is crucial here." Red Lion Broadcasting Co. v. FCC, supra, 395 U.S., at 390, 89 S.Ct., at 1806 (citations omitted)

...We have recognized that "it is of particular importance that candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." Buckley v. Valeo, 424

[19] 101 S.Ct. 2813, 453 U.S. 367, 69 L.Ed.2d 706, 7 Media L. Rep. 1563 (U.S.Dist.Col. 1981)

U.S. 1, 52-53, 96 S.Ct. 612, 651, 46 L.Ed.2d 659 (1976). Indeed, "speech concerning public affairs is ... the essence of self-government," Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Section 2(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."

They quoted the Supreme Court of Kansas, as follows: [20]

'(I)t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great."

The Articles of Impeachment of President Nixon were framed around the Constitutional Right of Free Elections

POINT ONE-A

TILL RECENTLY, CANDIDATES HAD EFFECTIVE DIRECT ACCESS TO VOTERS. TELEVISION REPLACED THAT.

Indeed, ask any schoolchild how it works. First nominations, then speeches, then balloting. And that's the way elections have been conducted historically.

From the very outset of our "Democratic Institutions", campaigning and voting were inseparably linked. From Rev.

[20] Burch J,. (78 Kan., at 724, 98 P., at 286):

Hooker's first Town meeting, in Hartford, Connecticut, to every organization in our society today, through Robert's Rules, elections are conducted at a meeting, by speech making followed by the casting and counting of votes. Jefferson, for instance, was elected a state legislator at a meeting. (1 Dumas Malone's biography of Thomas. Jefferson pg 129). The New York Town Law, the Village Law and the Education Law provide elections at such meetings and Art II, Sec 8 of the State Constitution (enacted 1894) exempted these from the other procedures of general elections. In such a system, "communication" with the voters is direct. The higher the office, the larger the constituency & area, the greater the need for television for effective communication.

The founders recognized this. Hear the words of George Mason at the 1787 Convention,[21] a staunch proponent of popular government, arguing against direct popular elections of the President (as did the others) thusly, right before the nine to one and then ten to zero vote against it:

"...a government which is to last ought at least to be practicable. Would this be the case if the proposed election should be left to the people at large. He conceived it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.---" (emphasis supplied)

Indeed, Madison (Federalist #57) and Hamilton (ibid # 84) denied the Anti-Federalists charge that the size of the country made an informed electorate for Congress impossible. What Mason had in mind, as to a requisite system to judge of the "pretensions" of candidates, was undoubtedly the procedure then in effect. Election day then, was made "fair day", a holiday and festival to attract voters to the County seat, the one voting place, where candidates had the opportunity to speak with

[21] Afternoon, July 17, Vol II, page 31 Records of 1787 Convention ,Farrand Edition

voters[22] There has, historically never been any movement to dispense with this due-process notion of judging of candidates.

By 1890, the few large polling places made identification by poll-watchers difficult and opportunities for voter fraud greater. The Australian Ballot fraud-proof or "official ballot" cast in a coercion-proof "polling place" requiring "electioneering" to cease 100 feet beyond, was to prevent fraud and coercion prevalent then, not to deny free speech, or "free elections"[23].

At the founding, "communication" came about through "transportation". "Transportation" was over "highways" (which included rivers and seas) which the common-law held were public, and not only open to all, but it was a "pourpresture" (a crime) for any-one to obstruct them.[24] [In Point two-A, we discuss the "trust" nature of these public rights, which this Court assimilated into the "public forum doctrine", misapplied below."]

Where the public highways crossed and "town squares" were laid out, they too, "by judge made law" became encumbered with the same "public easements" or "public incorporeal heriditaments". Preserved in these were "light[25], air and access, (ingress and egress[26])" , prospect and view.[27] They became the local "Hyde Park" or "Union Squares", open to candidates and ideas of all persuasions. Candidates for public office could reach the voters on a "soap-box" in the town square.

Television has taken the place of the streets and the town square, to which in the old days, the Courts fashioned doctrines of public and private easements by "dedication", "prescription", "presumed lost-grant", "implied offer" or "estoppel". The filing

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[22] American Revolutionaries in the Making. Political Practices in Washington's Virginia, by Charles S. Sydnor, Publisher Free Press.

[23] Messages of Governor Hill 1890. See Burson v.Freeman, infra..

[24] Irwin v. Dixon 50 U.S. 10, 9 How.10, 13 L.Ed. 25 (U.S.Dist.Col. 1850)

[25] A then known part of the electromagnetic spectrum .

[26] Extends into "the system of intersecting streets" and ties each occupant into the community for travel and communication .

[27] Donovan v. Pennsylvania Co., 199 U.S. 279, 26 S.Ct. 91, 50 L.Ed. 192 (U.S.Ill. 1905) McCoy v. Union Elevated R. Co., 247 U.S. 354, 38 S.Ct. 504, 62 L.Ed. 1156 (U.S.Ill. 1918) Roberts v. City of New York, 295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429 (U.S.N.Y. 1935)

of a map causes a dedication, which was required before subdivision was permitted, created these public rights in the Town Square and afforded a means of communication for candidates, that was fully adequate for the democratic system then. In the 1992 Democratic Primary for President, the "right" of a candidate to speak in the town square or public streets no longer afforded an adequate means of communicating with the voters and we come back to the Courts whence this right of communication of the community was first recognized. Today 99% of all households and 9 out of ten individuals have color television, and spend 40% of their leisure time watching same.[28] Candidates (and democracy) must go where the people are.

FREE SPEECH, EDUCATION AND THE FRANCHISE INSEPARABLE

Pennsylvania, in July 1776, in immediate response to Congress's request of the revolutionary committees in the former colonies to do so, was the first to draw up a State Bill-of Rights. It adopted a free-speech guaranty for its Constitution, which until copied by Vermont a few years later, was the only state to then do so. New York did it in 1821. All three states coupled a free-speech with a universal suffrage and a guaranteed support for free public education provision, as a triad; free elections, free-speech and free education. The Virginia ratifying Convention's requirement that Madison put Pennsylvania's free-speech provision (among others) in the Bill of Rights and the 1787 Conventions provisions for elections was an act of trust in "the common man", giving him the vote, to steer this country. For New York in 1787 had 90% illiteracy, slavery, "indentured servants", "tenant farmers" on "entailed" land, (feudalism) a large "poor house" and debtors prison population, persecuted Indians, agrarian revolt (Vermont succeeding); 10 percent of white males being eligible[29] In 1821 it adopted universal white

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[28] 1997 Statistical Abstract pages, Table 897 & 1381

[29] A People in Revolution The American Revolution and Political Society in New York (1760-1790) Edward Countryman. "Universal white manhood suffrage" in the 1821 State Constitution initiated later reforms. Decline of Aristocracy in the Politics of New York (1801-1821) Dixon Ryan Fox. The Calico Rebellion of 1846 resulted in further

male suffrage. The Fifteenth amendment, likewise, in giving Afro-Americans the franchise, simultaneously enacted the reconstruction statutes, requiring the secessionist states to constitutionally guaranty free public school education . Elections require educated choice, which only television today provides.

POINT ONE-B

"RESTRICTIONS ON CANDIDATES COMMUNICATIONS ARE INVALID, WHERE THE REMAINING MEANS ARE INADEQUATE,.

The government should not be able to give a monopoly of an airwave, owned by the public, which impedes a candidates access to them, where that is the only adequate means of communication to the electorate. It is a twentieth century pourpresture. A denial of "free election" guaranties,

In Members of City Council of City of Los Angeles v. Taxpayers for Vincent, [30]this Court said:

> "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S., at 647, 101 S.Ct., at 2563-2564, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate. (citations omitted)

POINT ONE-C

ASSUMING CONFLICT CAN NOT BE HARMONIZED, THE RIGHTS OF FREE ELECTIONS DOMINATE.

There is no conflict between the right to free and fair elections and First Amendment rights, but assuming a conflict should occur and that it could not be harmonized we respectfully submit that the latter would have to yield to the former, that the publics right of free elections is of paramount concern.

Constitutional reforms. Tin Horns and Calico A decisive episode in the emerging of Democracy by Henry Christman

[30] 466 U.S. 789 104 S.Ct. 2118, 80 L.Ed.2d 772 (U.S.Cal. 1984 Decided May 15, 1984

In Columbia Broadcasting System, Inc. v. Democratic National Committee, [31]it was said:.

> "... '(i)t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' Red Lion, supra, at 390, 89 S.Ct., at 1806."

Burson v.Freeman, [32] permitted the blanket total prohibition of electioneering within 100 feet of the polls.

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[31] 412U.S. 94, at 115, 93 S.Ct. 2080, 36 L.Ed.2d 772, 1 Media L. Rep. 1855 (U.S.Dist.Col. 1973)

[32] 504 U.S. 191, 112 S.Ct. 1846 119 L.Ed.2d 5, 60 USLW 4393, 20 Media L. Rep. 11 37 (U.S.Tenn. 1992)

Said the Court:

> "Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 361-363, 86 S.Ct. 1507, 1521-1522, 16 L.Ed.2d 600 (1966) (outlining restrictions on speech of trial participants that courts may impose to protect an accused's right to a fair trial). This case presents us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote--a right at the heart of our democracy."
>
> "This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." Reynolds v. Sims, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964)."
>
> "'No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)'".
>
> "Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and

Lowe v. S.E.C. [33]involved an SEC order forbidding an unregistered adviser from publishing newsletters containing investment advice, that is not specifically tailored to the needs of individual clients. It too discussed the numerous determinations where First Amendment rights were held subordinated to a superior right, or a "compelling state interest" "for the protection of society", among them, the right to express a legal opinion without a license; to practice law.

In Austin v. Michigan Chamber of Commerce,[34] the constitutional right of speech, implicit in campaign contributions, was prohibited to Corporations as an anti-fraud device.

POINT TWO

DEBATE EXCLUSION VIOLATES FIRST AMENDMENT

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undue influence. " See Eu, 489 U.S., at 228-229, 109 S.Ct., at 1023. "The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." Id., at 231, 109 S.Ct., at 1024. The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." Anderson v. Celebrezze, 460 U.S. 780, 788, n. 9, 103 S.Ct. 1564, 1570, n. 9, 75 L.Ed.2d 547 (1983) (collecting cases). In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.

[33] 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130, 53 USLW 4705, Fed. Sec. L. Rep. P 92,062 (U.S.N.Y. 1985)

"The Court determined long ago that although "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, ... there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed ... for the protection of society." Dent v. West Virginia, 129 U.S. 114, 121-122, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889). Regulations on entry into a profession, as a general matter, are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. Schware v. Board of Bar Examiners, 353 U.S. 232, 239, 77 S.Ct 752, 756, 1 L.Ed.2d 796 (1957)."

[34] 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, 58 USLW 4371 (U.S.Mich. 1990).

"Free speech", is not a license to commit fraud[35]. Exclusion of candidates from communications rights invariably carries a message that is fraudulent and fatal to the excluded candidate. It harms Broadcasters not. Viewing audiences are large. Barry Diller C.E.O. of Fox Broadcasting told the National Press Club Luncheon on April 17, 1997 that Broadcasters lose nothing and only make money from debates. Exclusion of rival candidates to favored ones has a value at "pay-back" time.

A Broadcasters role as speaker or of music maker or of sit-com maker or otherwise creator or originator of broadcasts is, as with Cable companies, separate from its role of operator of the transmission equipment and exclusive control over the airwaves. But Broadcasters claim to absolute and total control of both, for every second and minute of every day, as a "free speech" right. Airing of their hilarious "sit-coms" however, can be delayed. But, how about the electorates and candidates free speech rights? Their not the only one to have "free-speech" rights. We all have.

First, lets deal with the candidates alone. This is the proverbial second shoe awaited to be dropped from the decision Amici McCarthy procured in Buckley vs. Valeo. 424 U.S. 1, 46 96 S.Ct. 612, L.Ed.2d 659, 76-1 USTCP 9189. He brought that suit with former Senator James Buckley, supporting the principal Constitutional contention (and main holding,) as this Court put it:

> "In appellants' view, limiting the use of money for political purposes constitutes a restriction on communication violative of the First Amendment, since virtually all meaningful political communications in the modern setting involve the expenditure of money".

Amici argued the unconstitutionality of the statute involved, by virtue of the total abridgment of the right to communicate to the electorate (the same prohibited result here) on reaching the expenditure limit. Amici's Counsel's opening argument, as recorded in his book The Ultimate Tyranny. The majority over the majority, by Eugene McCarthy. Page 50 was:

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[35] The misrepresentation that the excluded candidates were not on the ballot is similar to Lowenstein v. Larkin, 40 A.D.2d 604, 335 N.Y.S.2d 799(N.Y.A.D. 2 Dept. 1972) giving the wrong polling places locations.

"A candidate who had reached the expenditure limit was prohibited from spending another penny to make his political views known. He could not issue a press release, mail a letter, or hire a secretary to type one. He could not hire a hall to make a speech or make a long distance telephone call"

The Court thus held:

"A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."

Surely this Court would never hold that this right of communication extends only to the wealthy Madison in Federalist Papers #57 said otherwise:

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." (emphasis supplied)

This was his answer to such anti-federalist arguments as Melancton Smith's New York Convention one on June 21st 1788.

This Court, in Buckley supra , declared the composition of the Federal Elections Commission unconstitutional by virtue

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solely of Madisons statement in Federalist Papers #47, (at 424 U.S. at 120. 96 S.Ct at 683 (and footnote 159) We assert Federalist Papers #57 (quoted above) should have the same effect. Besides, the *idea fixe* that wealth should not be a requirement to be President is deeply ingrained. It is said of every baby, no matter how humble his/her parents station, it could grow up to be President.

Running the gauntlet of obtaining ballot access in all States is no mean feat, in view of manpower requirements and cost. The New York Times reported that cost as follows, [36]

"Mr. Perot, a Texas Billionaire, almost single-handedly financed the task of placing either the party or an independent candidacy on the ballot in all 50 states at a cost of $8.7 million, Mr. Verney said."

Television is today the only effective means of communication in a 70 day primary period for fifty states. That cost many times more than $8.7 million. The public perception is that this money is probably raised by "quid pro quos". The other candidates had available to them free television time and we were totally denied it, by incipient governmental ("presidential") power and clearly by virtue of federal statute. As Broadcaster's "free speech", it was partisan and a campaign contribution "in kind", to the included candidates, but we'll bet it wasn't reported to the FEC and the expenses not deducted from their taxes.

The entire Federal Communications Act abridges a candidates right to communicate over the television airwaves. The assignment of all of the television airwaves to the broadcasters leaves no effective mode of communication open. A candidate must buy back at enormous prices, that which the government gave away exclusively to the broadcasters for nothing. Worst, the Federal Communications Act, 47 USC Sec. 315 denies fairness solely to those whom, in the subjective judgment (or calculated self-interest) of the Broadcasters, are not "news" or "newsworthy". This Orwellian phrase ultimately translates as either "wealthy" candidates like Mr. Perot, Forbes

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[36] Sunday, January 26th 1997, National section, page 14, col.1 Article by-Line Kevin Sack):

and others or to those whom the public perceives sell government favors for contributions; a perception abundantly justified. [37]

Anyone around politics awhile knows (as Amici McCarthy's book relates) that the "news" exception is an anti-insurgency provision, designed to protect incumbents. ("An incumbency protection Act" as Harold Ickes called the election laws in the N.Y. Times.) It is of a type American Party of Texas v. White supra and, Williams v. Rhodes, supra struck down.

We adopt two books by legal scholars, which are exclusively devoted to one of our First Amendment contentions in this litigation as a part of this brief and urge their reading. Capsulated, both essentially set forth that the "neutrality doctrine" of the First Amendment requires televised candidates debates.

The Irony of Free Speech by Owen M. Fiss, Sterling Professor of Law, Yale Law School, Publisher Harvard Univ. Press 1997

Democracy and the Problem of Free Speech by Cass R. Sunstein Karl LLewellyn Professor of Jurisprudence, University of Chicago, Law School, Publisher The Free Press 1995

Both professors fix, as there starting point, as do we, that the purpose of the "free-speech" is to achieve, what Professor Sunstein calls Brandeis's "deliberativeness" and Professor Fiss calls, an "essential for collective self determination". We refer to above by the name Locke, Jefferson, Madison and Brandeis referred to it above, as "reason"; the alternative to which is "force", which lies behind the entire design of our Constitution.

Prof. Bert Neuborne, previously the Constitutional election law specialist for the ACLU, testifying before the House subcommittee on the Constitution, on the proposal to amend the First Amendment, to undo what some think (and he debunks) Buckley vs. Valeo holds, explained as follows.

Here, or when in Court, arguing a case, no side could complain that his "free speech" rights were being abridged, when he had to wait his turn while opposition counsel spoke. The right to shout out at the same time, results in no one being heard. Nor would it be "neutrality" for this court to arrange a hearing at

[37] See The Buying of the President by Charles Lewis and the Center for Public Integrity, Publisher Avon Books 1996

which either side could not be heard. Neutrality here favors the electorate hearing the full argument from all candidates.

Professor Neuborne suggests posing the issue to this Court as to whether Roberts Rules of Order contravenes the First Amendment. Or does it not make possible those rights? When the free speech rights of one or more persons is asserted and are in conflict, an orderly and effective way for both to be fulfilled, is required. Would it be constitutional to amend the Rules of Civil Procedure with a like "news" exemption (applicable solely to Respondents, as "front-runners") to your fairness rules? Not permitting you to hear arguments from some Petitioners wouldn't provide fairness to them or you in resolving issues. Why should the electorate, in making important and basic decisions be denied information, anymore than you should?

POINT TWO -A

AIRWAVES, HISTORICALLY BEEN PUBLIC FORUMS

The 1994 decision below [38] distinguishes between broadcasters; holding only publicly owned television stations as "public forums" and others not. Why the "forum" turns on the nature of the terminable licensee, and not on the public ownership of the airwaves, nor the rights of the linked set owners, was not explained. Why the focus was not on the historic public ownership of a nations transportation-communications network, (pages 14, supra,) nor on the public need for information to have free elections is not apparent. At issue is an opening in broadcast time, that at worst delays a Broadcaster's other broadcasts. But to a candidate, its a vital communications link with the electorate.

But taken on its terms as primarily a free speech question, concerned with who the temporary licensees of the airwaves were, we examine it. The doctrine of "Public Forum" was derived in Hague v. Comminee for Industrial Organization" [39], from the "trust doctrine" as to streets and parks: You said:.

[38] Forbes v. Arkansas Education Television Communication Network Foundation, et al KHBS TV, KHOG TV; American Broadcasting Company 22 F3d 1423, (8th Cir 1994) Cert. denied. 115 S.Ct. 1962, (U.S. 1995) 131 L.Ed.2d 853, 63 USLW 3812, 63 USLW 3817 No. 94-1566. May 15, 1995.

[39] 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (U.S.N.J. 1939)

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[40]

We have previously argued that a "public street" is one that provides transportation and thus communication, tying a community together. The "trust" is created when people buy lots laid out along a street, creating private easements of light, air, view, prospect and access (ingress & egress) in the streets, public squares etc. streets, etc.; after which the government comes and subjects same (without 5th Amendment compensation, because not extinguishing them) to "public easements", but subject to a trust. The reason that Public squares became "Hyde Parks" is that the private easements, now subjected to the public easements, retains rights of each abutter and it is this community-wide interdependent benefit and dependence that creates the trust. The same is obviously true of monopolized "airwaves"[41], where 200 billion dollars of private television sets depend on them.

POINT THREE

DEBATE EXCLUSION VIOLATES THE "EQUAL PROTECTION" (AND ESTOPPEL PRINCIPLES).

The decision appealed from[42] holds that the "equal protection" clause requires access of all candidates to television debates held by a public broadcasting company. It rejects the argument that they or anyone should make such a content determination based on the broadcaster claims to be able to determine for the electorate who it should and shouldn't consider.

The potential awesome power of the Presidency and the way politics works, was to some degree, responsible for the deprivation of Amici's rights. Incontrovertibly, media access

[40] Had the speakers addressed the people in a park with a bullhorn or loudspeaker it wouldn't change the "public forum" nature of the park..

[41] Former Senator Robert Dole made the point in an Op-Ed article on page A-23 of the New York Times of Thursday March 27th 1997

[42] Ralph P Forbes v. The Arkansas Education Television Commission et al KHBS TV, KHOG TV; American Broadcasting Company 24 Med L. Rep 2295 No 95-2722WA August 21, 1996

determines who will be President. Assuming perfect innocence it must have passed through Media's heads that by making a person President they might create a "chit" (to use the political expression)? That Clinton "would owe them one". Let us borrow another's statements. Boyden Gray, White House counsel under President Bush, on McNeil-Lehrer hour on Thursday March 6th, though otherwise uncritical of the fundraising practices of the Clinton Whitehouse, said that just because of the power of the President over the FCC, there should be a Congressional investigation to see if there was a "quid pro quo". He went on to talk of the billions of dollars at stake for Media in the Communications Act, enacted under Clinton. David Broder's previously reported in the Washington Post, that the Clinton Administration was advocating the FCC to give additional frequencies, worth what Senator Dole, in his above referred to NY Times Op-Ed piece said was worth seventy billion dollars, to the media for nothing. President Clinton thereafter publicly called for requiring free television time for "candidates", something, it's agreed, Congressional incumbents will never do.

Was this not liken, to Professor Williston's classification, of a Unilateral Contract Type II, a consideration in exchange for a promise? The power of the government is inherently involved in the deprivation of excluded candidates Constitutional rights. Such power abridges "free speech" rights of excluded candidates?

Even private property, "serving a government function", implicates the "Equal Protections" clause and the "public airwaves" are not private property. When broadcasters pretend impartiality and say they are conducting a non-partisan debate to assist the public in deciding how to cast their vote, as a public service, as they always do, they should be held to their own offer and representation and not be permitted to feign non-partisanship, favor some of the candidates and discriminate against others. Not because it's fraud, which it is,[43] but because an equity court should estop them. Having conscripted themselves to serve the public, and deterred government from

[43] Not once, in debates from which Amici was excluded, or we are advised in Forbes, did the Broadcasters even suggest that they were presenting less than all the candidates. Theres no way to fight this back.

doing what they originally did, they should do so in the expected required neutral manner, not as a partisan.

This estoppel argument should be differentiated from that which we shortly discuss, that of a "state-actor", where the broadcaster becomes an integral part of the primary election process, as an aid to voters, again relieving the State from attempting to provide a candidates forum for the voters[44]

POINT THREE-A

"STATE ACTOR","GOVERNMENTAL ACTOR" DOCTRINE

A functionary in the conduct of an election is a "state actor" or "governmental actor", under the 1st and 14th amendments. The Smith v. Allwright,[45] holding as to political parties in the primary election process, applies as to broadcasters.

A broadcaster may also be a "governmental actor" or "state actor", under Columbia Broadcasting System, Inc. v. Democratic Nat. Committee,[46] (3 Justices holding the Broadcaster there was not). There, organizations opposed to the Vietnam war sought to buy air-time to run spot advertisements opposed to the war and C.B.S. refused to sell it to them or any

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[44] As stated in Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (U.S.Ill. 1980) Decided June 20, 1980:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Id., at 95-96, 92 S.Ct., at 2290. (citations and footnote omitted).

[45] 321U.S.649, 64S.Ct.757, 51A.L.R.1110, 88L.Ed.987 (U.S.Tex.1944)

[46] 412 U.S. 94, at 115, 93 S.Ct. 2080 (U.S.Dist.Col. 1973), 36 L.Ed.2d 772, 1 Media L. Rep. 1855 Decided May 29, 1973.

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advertiser, but previously had programming on both sides of the issue. The request was for broadcasting an informational message, was not made for use in an electoral campaign, nor were remaining means inadequate, nor a media blackout impeding a candidates communication with the voters or other wise was it a "state actor". Since there was no majority or even plurality opinion for whether there was "state action", the holding of the case is simply that, in a non electoral setting, a uniform policy by a broadcaster to refuse paid editorial advertising for a message, on an issue already frequently covered by the broadcaster, was not State Action.

In no case, including the above, has this Court held that the role of a broadcaster, in an election debate is not that of a "public actor". Smith v. Allwright, supra makes quite clear that it is. Previously in Nixon v. Herndon[47] Texas's primary law was struck down because it excluded Afro-Americans. Texas therefore relinquished control over the primary to the Democratic

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These three judges said:

> "The Court of Appeals held that broadcasters are instrumentalities of the Government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as 'proxies' or "fiduciaries' of the people.' 146 U.S.App.D.C., at 191, 450 F.2d, at 652. These characterizations are not without validity for some purposes, but they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints. (FN14)
>
> "In dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. When governmental action is alleged there must be cautious analysis of the quality and degree of Government relationship to the particular acts in question. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860,

[47] 273 U.S. 536 (1927).

Party, who made a regulation excluding blacks. The Smith Court held taking the function of the State makes one a "state actor".

Imagine that a convention system had been employed and the Democratic Party contracted out with a private party to provide the sound system for the gathering. Imagine further that he refused to allow Afro-Americans to talk into the microphones so they couldn't participate and he would only carry speeches of whites. No doubt taking that function of an election makes him a "state actor".[48] Substitute ear-phones, radio or television for loudspeakers changes neither the function or thus the result.

But Smith, supra, which is right on point should be followed. The Broadcasters chose to be the sole means of communication and became "State Actors"

POINT FOUR

"SIGNIFICANT" AND/OR "MAJOR CANDIDATE" IS NOT A VALID GROUND FOR EXCLUSION.

The standard media excuse, lack of "significance", held below and in LaRouche v. Kezer,[49] and Fulani, v. Brady[50] to be, subjective and meaningless terms is no basis to deprive the voters from making that judgment nor deny a candidate the right to make himself "significant". The thousands of reform club members represented in the NDC Delegate Assembly, who overwhelmingly endorsed Amici, has for 40 or more years been in the business of selecting statewide candidates, most of whom they make win. They overwhelmingly found Amici "significant"" and "electable". This is their hobby or business. When Media's

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[48] The 2nd circuit stated in Lebron v. National R.R. Passenger Corp. (Amtrak),:

> "As the Supreme Court has noted, "formulating an infallible test" of government action is an " 'impossible task.' " Reitman v. Mulkey, 387 U.S. 369, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830 (1967) (quoting Burton, 365 U.S. at 722, 81 S.Ct. at 860). Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton, 365 U.S. at 722, 81 S.Ct. at 860."

[49] 787 F.Supp. 298, (U.S.Dist.Ct., D. Conn. Feb. 28, 1992. Memorandum Decision on Motion for Reconsideration March 9, 1992.

[50] S.D.N.Y. 809 F.Supp. 1112, Jan. 5, 1993

expertise was questioned, they told Meyrowitz, they got advice from an unnamed national party official, whose claim to such "forecasting ability" at such early stage and from such vantage point is pure nonsense. (& violates party rules, cf see footnote 1).

Ross Perot, Malcolm Forbes and Michael Huffington were recently deemed "significant" by the press; all previous unknowns. A very high percentage of Congressional candidates have been millionaires. Since that type of money is needed for communications, the circular nature of the proposition is obvious. A candidate can get the right to communicate, if he already has it. Others are perceived to sell their votes for "warchests". Ben Franklin's answer to the "type of government wrought" question is now : "It's a plutocracy, if you can keep it."

The halls of government are filled with candidates for every office, who started as unknowns and didn't become "significant" or "major" till they obtained media exposure. Excluding candidates assures they will remain "insignificant".

POINT FIVE

THE 47 USC 315 "NEWS" EXCEPTION DENIES "EQUAL PROTECTION"

As applied the misnomered "fairness" provision of the Federal Communications Act, Section 315, provides for unfairness and inequality of access. See decisions discussed in The Ultimate Tyranny, etc. supra. It institutionalizes unequal treatment by exempting "news" which has produced rulings that those in the lead in the mythical horserace are "news" and entitled to unequal treatment. It's exemption of "news" from the "equal protection" clause is, within the context of presidential debates, an unequal preference to the assumed "lead" candidates and those of the major parties.

"News", to the media and the press, is not synonymous with information, at least not the type envisaged by this courts decisions, cited in Point I. It is not the information that voters need in voting. "News", to the media, is when a man bites a dog. It is not "news" when a dog bites a man. It is "news" when one plane crashes, but not when a thousand take off and land safely in one day. It is the unusual, and the peculiar that is "news". What is pernicious about Section 315 is that media treat presidential politics as a "horse race"; "news" being solely as the

doings of the leading candidates. Thus section 315 exempts major party or "lead" candidates from the equal protection clause.

Professor Meyrowitz reports Chris Black's (of the Boston Globe) telling explanation of the difference (pg 59):

> "Ultimately, were in the news business...Our role is to report the news, not just information..."

The decisions saying truth chases out falsehood, that the solution to false opinions lies in more speech state an objective, not always achieved. Likewise, as to the goal that candidates compete with ideas, program, qualifications. As Professor Meyrowitz concluded, the public believes, wants and expects that, (pg 46) but that's not the way the media sees it and thus not the way it works. That's what differentiates views of media, from the views of the public at large. Meyrowitz concludes pg 48:

> "Another factor is the varying conception of "what a presidential campaign is all about". Generally, the public logic I heard expressed–at campaign events, in casual conversations, in newspaper reports on public polls and the "public mood", in letters to the editor, and in my classes--revealed voters hungry for candidates with new ideas for solving our country's problem. Public logic generally sees a presidential campaign as fostering a dialogue on key issues. But the national journalists I spoke with mostly saw the campaign as a horse race".

Direct candidate access is required to have free elections.

CONCLUSION

THE JUDGEMENT BELOW SHOULD BE AFFIRMED, AND MADE APPLICABLE TO ALL BROADCASTERS.

May 14, 1997 RESPECTFULLY SUBMITTED,

_____

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In the

Supreme Court of the United States

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION, et al.,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of affirmance.[1] All parties have consented to the filing of this amicus brief. The letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the First Amendment freedom of speech arena will provide an additional viewpoint with respect to the issues presented. PLF attorneys have participated in numerous other cases before this Court including *Keller v. State Bar of California*, 496 U.S. 1 (1990), *Glickman v. Wileman Brothers & Elliott*, Docket No. 95-1184 (decided June 25, 1997), *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), and *Rosenberger v. Rector and Visitors of University of Virginia*, __ U.S. __, 115 S. Ct. 2510 (1995).

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

PLF believes that America was founded on principles of open political discourse and opportunity. These principles are furthered by the existence of third, minor political parties which challenge, and hold the potential to supplant, the two major parties. Policies developed by third parties have made their way into the mainstream over time. Moreover, third parties provide an outlet for those individuals whose beliefs are not represented adequately by the major pa.ties. Thus, third parties provide a mechanism to keep potentially disaffected and withdrawn Americans within the political process. PLF also believes, however, that no candidate, belonging to a major or minor party, is entitled to governmental benefits to pursue his or her candidacy.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals, holding that governmental exclusion of an independent, qualified, candidate from a state-sponsored political debate violates the First Amendment freedom of speech, is reported at *Forbes v. Arkansas Educational Television Commission*, 93 F.3d 497 (8th Cir. 1996).

STATEMENT OF THE CASE

Ralph P. Forbes was a legally qualified independent candidate for the Third Congressional District in Arkansas in 1992. *Forbes*, 93 F.3d at 500. Two weeks prior to the November, 1992, election, state-sponsored Arkansas Educational Television Network (AETN) held a debate between the Republican and Democratic candidates for the Third Congressional District. *Id.* Although Mr. Forbes asked to be included in the debate, AETN refused and conducted the

debate without Mr. Forbes' participation. *Id.* Mr. Forbes sued in federal District Court, alleging violations of the Civil Rights Act and the First Amendment to the United States Constitution. His motion for a preliminary injunction to be included in the debate was denied and, upon AETN's motion after the debate, the District Court dismissed the complaint on December 16, 1992. The Eighth Circuit Court of Appeals, in an *en banc* decision, reversed the District Court decision ruling that Mr. Forbes had alleged a First Amendment violation sufficient to defeat a motion to dismiss. *Forbes v. Arkansas Educational Television Communication Network Foundation*, 22 F.3d 1423, 1428 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994).

The District Court conducted a trial on Mr. Forbes' claims and entered judgment in favor of AETN on June 7, 1995. The Eighth Circuit Court of Appeals again reversed the District Court on August 21, 1996. *Forbes*, 93 F.3d 497. The court held that

> a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on such a subjective ground [that he was not a "viable" candidate]. To uphold such a defense would, in our view, place too much faith in government.

Id. at 500. AETN petitioned this Court for a writ of certiorari on November 19, 1996, which was granted on March 17, 1997.

SUMMARY OF ARGUMENT

The case presents this Court with a First Amendment claim highlighting the tension between a state-sponsored television station's duty to provide equal access in its debates

to all legally qualified candidates and the potential consequence of establishing a constitutional entitlement to public broadcast time. If this Court determines that public broadcasting may legitimately provide aid to political candidates by disseminating candidates' messages through a debate forum, the necessary corollary is that the state may not discriminate among the legally qualified candidates when determining who may be included in the debate. Third parties have proven to be an important force in American politics throughout history, and their exclusion from the single most effective way to address voters harms the political process. However, nondiscrimination would most appropriately take the form of declining to provide any state resource, whether it be cash or air time, to *any* candidate, thus avoiding the potential of creating an "entitlement" to public resources.

ARGUMENT

I

THIS COURT'S DECISION IN TIMMONS V. TWIN CITIES AREA NEW PARTY SHOULD NOT BE INTERPRETED TO PERMIT OUTRIGHT DISCRIMINATION BY GOVERNMENT AGAINST THIRD PARTIES AND INDEPENDENT CANDIDATES

In *Timmons v. Twin Cities Area New Party*, __ U.S. __, 117 S. Ct. 1364, 1374 (1997), this Court held that election regulations which, in practice, favor the two major parties are not unconstitutional on that basis. The issue in *Timmons* was Minnesota's ban on "fusion" candidacies for elective office. The ban prohibits a candidate from appearing on the ballot as the candidate of more than one party. *Id.* at 1367. The Court upheld the ban against a First and Fourteenth Amendment

challenge on the grounds that the state's interest in preserving political stability (*e.g.*, the two-party system) outweighed the infringement on the rights of New Party members and candidates. *Id.* at 1375.

While the court recognized that a state may not "completely insulate the two party system from minor parties' or independent candidates' competition and influence," *id.* at 1374, the court went on to hold that a state has the power to decide that "political stability is best served through a healthy two party system." *Id.* The court has thus identified a tension between its jurisprudence which forbids a freezing of the status quo (*e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 439 (1971)) and case law permitting the state to favor the political parties currently in power. *Timmons* tipped the balance in favor of the major parties who seek to perpetuate their power.

While it is true that the two-party form of government provides a certain stability, this holding proves too much. After all, a one-party form of government--a dictatorship--may be the ultimate in stability--at least so long as the dictator lives. "Stability" often comes at the price of freedom. Third parties prevent Democrats and Republicans from irrevocably institutionalizing themselves as the only options with which voters are presented. Thus, it is the *existence* of third parties, rather than their electoral success, in which their value lies. In this case, this Court has the opportunity to revive the hopes of third party partisans. This Court should recognize that if the state is going to provide resources to candidates, the state does not have the option of picking and choosing which candidates it will support .

This Court in *Timmons* argued that the two parties, with their wide-ranging approaches to policy and internal coalition building, cover most of the American political spectrum. *Timmons*, 117 S. Ct. at 1374. Despite the best efforts of the

major parties, however, third parties and independent candidates have not disappeared. From the Socialist Party to the Libertarian Party to the newly formed Reform Party, third parties represent the views of a significant minority of American voters. Third parties' important and beneficial impact on the major parties and on American policy should not be destroyed by the state. As shown below, the entry of minor candidates into a normal two-party electoral contest can influence the outcome of the election in any of three distinct ways: by influencing who turns out to vote, by altering individual voters' preferences for candidates, or by splitting one or more of the major candidates' vote. G. Mauser, POLITICAL MARKETING: AN APPROACH TO CAMPAIGN STRATEGY 113 (1983). Nonetheless, as a practical matter the two major parties run the state and, in this case, are using state resources (air time) to maintain the parties' positions of power.

The *Timmons* rationale should not be employed in this case to create a rule allowing the state to discriminate against third parties. Through policy innovation and the potential to influence the electoral outcome, through their assurance that major parties will be held accountable and that disaffection with the two-party structure will be channeled into voter participation rather than a rejection of the political process, third-party and independent candidates play a vital role in the American political process. It is important to note that this role is independent of electoral success. By expanding the political dialogue, the participation of third party candidates in state-sponsored debates continues to perform their traditional role. Eisner, *Non-major-party Candidates and Televised Presidential Debates: the Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 979-80 (1993) (Eisner). Contrary to the implicit denials in *Timmons*, third parties and independent candidates add value to the American political system and should not be cast aside to increase the fortunes of the two major parties.

A. Third Parties Have Enjoyed a Meaningful Role in American Politics Since Nearly the Founding of the Republic

The two major parties, the Republican Party and the Democratic Party, have never been the exclusive voices for Americans. Some third parties essentially have been doctrinaire or ideological (*e.g.*, the American Communist Party, the Socialist Party, and the Libertarian Party). Kruschke, ENCYCLOPEDIA OF THIRD PARTIES IN THE UNITED STATES 2 (1991) (Kruschke). Other parties, such as the Progressives of 1912, and the States' Rights, or "Dixiecrat," Party of 1948, split off from one of the major parties for reasons of dissatisfaction of one kind or another. Other examples of this type of party would include the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968. *Id.* at 3. Other parties sought to gain a public forum for their philosophical viewpoints, usually on a single issue. These parties include the Vegetarian Party, the Prohibition Party, the Free Soil Party, the Anti-Masonic Party, and the Know-Nothings, a nativist, anti-Catholic, and anti-Irish party especially vocal during the 1850s. *Id.*

Over the years, the success of third parties has largely depended on the existence of an issue that produced extreme internal divisions within the two major parties. The most successful third party in the history of the United States came into existence at the time of the greatest crisis ever faced by the nation. The Republican Party began in 1854 as a third party that strongly supported the northern abolitionist movement. The two major parties at that time, the Democrats and the Whigs, were sharply divided along regional lines over the issues of slavery and states' rights. The Republicans aggressively campaigned in the mid-term congressional elections held in November of that year. They won not a

majority but a plurality of seats in all contested races against Democrats, Whigs, and candidates from a few other minor parties, such as the Freesoilers and Liberty Party. During the late 1850s, the Whig Party collapsed; its members joined either the Republican, Democratic, or Constitutional Union parties. S. Rosenstone, R. Behe, and E. Lazarus, THIRD PARTIES IN AMERICA 56 (1996) (Rosenstone). In 1860, Abraham Lincoln was elected the first Republican president of the United States.

At its 1860 convention, the Democratic Party saw its southern delegates walk out and form a new party, the National Democratic Party, which in turn nominated John Breckinridge, a pro-slavery candidate, for president. *Id.* at 60. The Republican Party, in only its second attempt at fielding a national candidate, managed to win 40% of the popular vote due in large part to the solid support of the northern abolitionists. However, this 40% allowed the Republicans to carry all of the northern and western states and, thanks to the winner-take-all method of calculating electoral college votes, 59% of the electoral college votes. D. Mazmanian, THIRD PARTIES IN PRESIDENTIAL ELECTIONS 56 (1974) (Mazmanian); Anderson and Freeman, *Taking the First Steps Towards A Multiparty System in the United States*, 21 FLETCHER FORUM OF WORLD AFFAIRS 73, 80 (1997) (*First Steps*). After the Civil War, the traditional two-party system revived, featuring the Democrats and the Republicans. These two parties did not face another major challenge until Theodore Roosevelt ran as the candidate for the Progressive, or Bull Moose, Party, in 1912. *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 75-76.

In 1912, the country faced continuing crises caused by growing economic disparities among the population. The political parties were still coping with the nation's industrialization and the changing role of government in the regulation of private enterprise. The Democratic Party

nominated reformer Woodrow Wilson and the incumbent Republican President, Howard Taft, engineered his renomination at the Convention through the use of back-room politics, alienating Teddy Roosevelt and the entire reform-minded wing of the Republican party. H. Nash, THIRD PARTIES IN AMERICAN POLITICS 252-56 (1959). This group became the core of Roosevelt's third-party candidacy as a "Progressive." With his proposals for greater government oversight of business, Roosevelt was able to take second place behind Wilson and ahead of Taft. However, due to a lack of foundational support and Roosevelt's own lack of interest, the Progressive Party faded after the 1912 election. The reforms instituted by the Wilson administration seemed to win over many of the Progressive Party voters. E. Robinson, THE EVOLUTION OF AMERICAN POLITICAL PARTIES 335 (1924); *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 77.

The next major third-party intrusion into the two-party system was George Wallace's presidential bid under the banner of the American Independent Party. Wallace represented the minority of voters who favored continued segregation and a strong military solution in Vietnam. *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 76. He received 13% of the vote in the 1968 presidential election, but as his views came to represent fewer and fewer Americans, his party's viability decreased until it disappeared. In 1972, Wallace ran again as a Democrat, but his candidacy was abruptly terminated after an attempt on his life. *Id.* at 77.

Following Wallace, John Anderson was the nonmajor party candidate to obtain a large following. Anderson sought the Republican nomination for the presidency in 1980, but after losing in early primaries, declared himself an independent and continued to campaign. His independence was demonstrated by his stands on taxes, women's rights, and civil rights, which did

not fit neatly into Republican or Democratic molds. *Id.* In the end, Anderson received just under 7% of the votes cast. *Id.*

Most recently, of course, Ross Perot bankrolled not only his own candidacy for president in 1992 and 1996, but also the Reform Party. Capturing the imagination of a significant portion of the American electorate, Perot received 19% of the vote in 1992, and 8% in 1996. *Id.* at 78. While Perot's own pocketbook cannot be discounted as a factor in his popularity, the continued viability of the Reform Party (which has run candidates for other offices), demonstrates that the policy positions espoused by Perot reflected the beliefs of many people in a way the two major parties did not.

B. The Political Viability of Third Parties Has Ebbed and Flowed over the Years; but Political Events Demonstrate Substantial and Increasing Public Interest in Third Parties over the Past Fifteen Years

The earliest polls on third parties (appearing in Roper surveys in 1938 and 1944) show overwhelming support for and satisfaction with the two-party system. Collet, *Third Parties and the Two-Party System*, 60 PUBLIC OPINION QUARTERLY 431, 433 (1996) (Collet). Support for the current system continued to be strong into the 1960s--even as George Wallace emerged as an independent candidate and voters began to act more independently, in terms of self-identification and ticket splitting. *Id.* By the early eighties, however, the drop in support for the system began to be manifest, and by 1994, for the first time, only a minority of those asked said that they felt that the Republicans and Democrats were doing "an adequate job"; a majority felt there should "be a third party." *Id.*

In the 1990s, third parties have seen reasons to hope for greater electoral success.[2] First, approximately one-third of all Americans of voting age claim to have no party ties. P. Abramson, J. Aldrich, and D. Rohde, CHANGE AND CONTINUITY IN THE 1988 ELECTIONS 295 (1990). Second, and perhaps more important, only three adults in ten claim to be strongly committed to either of the two major parties. *Id.* Third, there are more than 80 million nonvoters, who, if brought to the polls, could transform any political movement into a majority party. *Id.* Given these trends, some third party candidates possibly could attain the "viability" AETN demands as a precondition to receiving state-subsidized air time. Nonetheless, "viability" is a tenuous concept which, left in the hands of the state, begs for arbitrary application and exclusion of any nonfavored candidate.

Timmons' assertion that the two-party system is necessary to political stability is belied by the increasing activity of third parties and independent candidates. The candidacies of George Wallace and John Anderson in the 1968 and 1980 presidential elections attracted some attention to the existent strains in the system, but Ross Perot's 19% showing in 1992 showed the cracks in the two-party armor. Collet at 431. Still, American politics remained stable and the major parties' desire to draw the "Perotistas" into their own folds shifted the debate to issues of interest to Perot's followers, such as the federal deficit.

Recent polls demonstrated the public's yearning for new ideas and greater choice in the political system. In 1995, a Los Angeles poll found that roughly half of the public consider the

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[2] Still, there is no denying that "many features of our political system--*e.g.*, single member districts, 'first past the post' elections, and the high costs of campaigning--make it difficult for third parties to succeed in American politics." *Timmons v. Twin Cities Area New Party*, 117 S. Ct. at 1371.

two-party system to be "unsound." Collet at 432. A 1995 NBC/*Wall Street Journal* poll found that 82% said the two-party system has either "real problems" or "is seriously broken." Collet at 433.

Moreover, the public is interested in having more candidates to choose from during election time. A *CBS/New York Times* survey in December, 1995, asked why individuals said they wanted a "new political party." Seventy-five percent said that it was because "having more [candidates] is better for the country," while only 16% said that it was because the two parties did not "produce good candidates." Another CBS/New York Times survey conducted in April, 1996, showed a plurality (48%) agreeing that "having only two parties can't provide voters with enough options." Collet at 434.

While the poll data have not translated into certain electoral success for third parties and independent candidates, success has not been entirely elusive either. Socialist Party candidates have been elected mayors in Bridgeport and Hartford, Connecticut, and Milwaukee, Wisconsin. Voters have also elected Socialist candidates to the United States House of Representatives from Milwaukee (Victor Berger, 1911-13, 1923-29) and Manhattan (Meyer London, 1915-23). Vermont has elected Socialist Bernard Sanders to the United States Senate since 1990. M. Barone and G. Ujifusa, ALMANAC OF AMERICAN POLITICS 1296 (1994). The Farmer-Labor Party has been especially successful in Minnesota, particularly during the 1920s and 1930s. It even won the governorship of that state in the 1940s. In New York, Conservative Party candidate James Buckley was elected to the United States Senate. Kruschke at 3.

C. Third Parties Have Been the Source of Numerous Innovations That Transformed American Policy

The most obvious and concrete role third parties serve is that of policy innovators. The direct election of senators, women's suffrage, and the graduated income tax were all issues first espoused by third parties (Rosenstone at 8), as were the ideas of initiative, referendum, and recall (Kruschke at 8), and railroad regulation, high standards for civil service, and the encouragement of both labor unions and cooperatives (L. Mitchell, WITH THE NATION WATCHING: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON TELEVISED PRESIDENTIAL DEBATES 84 (1979); Eisner, 141 U. PA. L. REV. at 983). *See also Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream.").

> [National] campaigns [in our political system] serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidates has little hope of election.

Common Cause v. Bolger, 512 F. Supp. 26, 32 (D.D.C. 1980), *aff'd*, 461 U.S. 911 (1983).

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were

> ultimately accepted. Mere orthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957).

Controversy is sometimes shunned by the major parties; certain topics (*e.g.*, dealing with the budget deficit, "liberal" versus "conservative" approaches to government, the question of the necessity of increasing taxes) are often avoided or completely ignored until it becomes absolutely necessary, from a political perspective, to deal with them. Then the minor parties, or minor candidates, see their ideas placed on the public agenda. "[M]ajor portions of the New Deal programs of Franklin Roosevelt are ... attributed to the Progressive platforms of the preceding decades." Mazmanian at 81. Those third parties that have been the most long-lasting have been those with an enduring philosophical or ideological foundation largely inconsistent with attitudes held by the majority of Americans. Thus, it may be ideology that holds those at the fringes of society most closely together. Kruschke at 8-9. When Ross Perot first ran for the presidency in 1992, he argued that the major party candidates were not paying heed to the economic challenges facing the nation, in particular the huge and mounting federal deficit. His campaign rode a wave of voter contempt for career politicians and their perceived lack of responsiveness to voter concerns. While Perot did not prevail in his candidacy, he did help to determine and focus the issues that became central to the 1992 campaign. *First Steps*, 21 FLETCHER FORUM OF WORLD AFFAIRS at 78.

Ironically, the third party ideas that generally become enacted do so only after being embraced by one of the major parties. This co-optation exposes a cynical reality of two-party politics, it nonetheless dramatizes a key function of minor

parties: by raising issues that the major parties feel compelled to seize upon as their own, third parties serve as useful catalysts for policy change. Eisner, 141 U. PA. L. REV. at 985. If nothing else, minor parties provide a means of expression of "alternative" ideas and alternative policies for American government. Were it not for the existence of third parties, it is possible that even more Americans would abstain from voting. Kruschke at 8.

Thus, third parties keep the major parties accountable by helping to shape the programs Democrats and Republicans pursue while in office. Rosenstone at 222 (noting impact of George Wallace's candidacy on the Nixon Administration's civil rights policies). The full extent of the third-party role in shaping public policy is not always immediately apparent; third-party ideas often filter gradually into major-party programs. Mazmanian at 81. In many cases, however, the influence of third parties is more obvious and unmediated. *Id.* The nettlesome presence of minor parties, then, is a subtle inter-election goad to major parties, who adopt their positions not out of an altruistic desire to represent minority viewpoints, but to put third parties out of business. Rosenstone at 221; Eisner, 141 U. PA. L. REV. at 986.

D. Third Parties Provide an Outlet for Individuals Disaffected with Major Parties to Continue Their Participation in the Political Process

Third parties serve as conduits for the expression of discontent with the major parties. Rosenstone at 5-6, 215; Kruschke at 9. This role is crucial given the downward spiral in voter turnout in recent decades. Eisner, 141 U. PA. L. REV. at 986 and n.66 (citing Bureau of the Census, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989 258 (109th ed. 1989) (Table 433 showing that the percentage of the voting age population casting presidential

ballots has consistently declined from 62.8% in 1960 to 50.2% in 1988)). By giving the disaffected a voice and a corresponding desire to take part in the political process, third parties encourage the electoral participation of the disenchanted and ensure that these marginal constituencies do not resort to less acceptable forms of protest, such as civil disobedience or withdrawal from the political process. Rosenstone at 224; Eisner, 141 U. PA. L. REV. at 986-87.

Thus, partisans of minor party candidates may perceive the state's exclusion of their candidates from political debate as tantamount to delegitimization. Rosenstone at 39. Debates "enhance support for the political system by legitimizing both nominees." D. Lanoue and P. Schrott, THE JOINT PRESS CONFERENCE: THE HISTORY, IMPACT, AND PROSPECTS OF AMERICAN PRESIDENTIAL DEBATES 105 (1991); Eisner, 141 U. PA. L. REV. at 998. The negative implication of this proposition is that a candidate who is not included in the debates cannot be legitimized. Absent legitimization--to say nothing of support--third parties will remain unable to influence the political agenda, raise important yet overlooked issues, or hold the major parties accountable. Rosenstone at 222; Eisner, 141 U. PA. L. REV. at 998. By excluding third-party candidates, the state makes a powerful statement to the candidate's supporters that such candidates do not matter. Inclusion of such candidates, on the other hand, would give minor-party candidates "the opportunity to overcome the widespread attitude that third-party candidacies are a waste of time." Barmann, *Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Debates*, 23 COLUM. J. L. & SOC. PROBS. 441, 453 (1990).

For the reasons stated above, the state should show enough respect for the venerable third party tradition in this country to prevent the two major parties from rigging the rules

of the political process to perpetuate their own power, to the ultimate exclusion of third parties and independent candidates. Given this background, the court below correctly held that the state may not give governmental benefits to some legally qualified candidates for the purpose of furthering their campaign while excluding other equally legally qualified candidates. This Court should affirm the decision of the court below.

II

THIS COURT SHOULD HESITATE TO LINK THE RIGHTS OF THIRD PARTY CANDIDATES TO HAVE EQUAL ACCESS TO A PUBLIC FORUM TO AN ALLEGED RIGHT TO PUBLIC FUNDING OF POLITICAL DEBATES

The First Amendment's negative constraints on government that embody the traditional conception of "freedom of speech" have been instrumental in the achievement of the broadly participatory, relatively open, officially uncensored, debate which is the hallmark of American politics. This good result of the First Amendment, however, should not be mistaken as the principle embodied in "free speech." BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1261 (1994). That is, it is not the function of the First Amendment to *ensure* the widest possible political debates. *Id.* Instead, the First Amendment ensures that the state has no power to *restrict* political debate. The First Amendment guarantee of "freedom of speech" is turned on its head when it permits or requires "government coercion, regulation, or even prohibition of speech in the name of 'enhancing freedom.'" *Id.* at 1277.

Expending public funds to promote political debates raises constitutional concerns regarding the rights of individuals

to refuse to subsidize the propagation of ideas with which they disagree. *Keller v. State Bar of California*, 496 U.S. at 14; *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977). In the context of agency shop fees, and mandatory bar dues, this Court has held compelled subsidization of speech to be as reprehensible as the prohibition of speech. In *Abood*, this Court stated:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.

Id. at 233-35 (footnotes omitted). In *Abood*, this Court held unconstitutional a mandatory agency shop fee paid to a teachers' union that spent the fee--over the fee payer's objection--on political and ideological activities unrelated to collective bargaining, contract administration, and grievance adjustment. *Id.* at 235-36. Similarly, in *Keller v. State Bar of California*, 496 U.S. 1, the Court declared that the California State Bar could not use a dissenter's mandatory bar dues for political and ideological activities unrelated to regulating the legal profession or improving the quality of legal services available to the people of the state. *Id.* at 14.

The constitutional concerns regarding compelled speech do not disappear simply because the taxpayer is the subject of the constitutional violation. On the contrary, because taxpayers can do little to prevent Congress from spending public funds in

violation of their First Amendment rights,[3] policy makers should do more to ensure that public expenditures protect taxpayers' liberty interests. In this case, the state's selective dissemination of chosen candidates' views distorts the political dialogue. Voters in Arkansas' Third Congressional District identified three candidates they deemed worthy of a place on the ballot. Two of those candidates, the candidates representing the major parties--and having the greatest stake in the status quo--should not be able to use tax dollars to further their own political ideas and ambitions, especially at the expense of the third candidate. Permitting the major party candidates to rally the state's resources around their campaigns implies the imprimatur of the state on their candidacies. Tax money should not be used to propagandize selected candidates' views.

For the foregoing reasons, this Court should decline to link the right to equal access to a limited public forum to any alleged right to public subsidization of political debates.

CONCLUSION

Third parties historically played and continue to play a significant role in American politics. Often third parties voiced dissenting views and made sufficient inroads at the polls to force the attention of the two major parties. Frequently third parties were the vehicles through which new ideas or policies were launched and tested. When a new proposal met a

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[3] This Court has held that taxpayers do not have standing to challenge the unconstitutional expenditure of public funds unless the expenditure arises under Congress' taxing and spending power or the Establishment Clause. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479-80 (1982).

favorable reception it was adopted by a major party. Third parties played a significant part in American political history--even in the maintenance of the traditional "two-party" system. W. Hasseltine, THIRD PARTY MOVEMENTS IN THE UNITED STATES 13-14 (1962).

Third party and independent candidates could pursue voters with relative ease in the days of handbills and personal appearances. The current political reality, however, is that candidates for public office representing an area the size of a congressional district must pursue voters through the medium of television. If the state sponsors television debates among the candidates for public office, the state must not discriminate against any legally qualified candidate. Exclusion from debate eliminates the most effective means for those candidates to address the voters.

While the state may not discriminate, this does not mean that the state is required to provide a debating forum for candidates. To the contrary, the candidates have no entitlement to a state subsidy in the form of free air time. In deciding this case, this Court must make clear that the state must not discriminate among candidates of equal qualifications who seek to participate in a state-sponsored debate; but, the state is under no obligation to provide the debating forum at all. As state

intrusion into the political process causes more distortion than if the process flows free of regulation or restrictions, this is amicus' preferred result.

For the reasons set forth above, the decision of the Eighth Circuit Court of Appeals should be affirmed.

DATED: June, 1997.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1996

THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Brief of Amicus Curiae, Greens / Green Party USA (Filed on consent)

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Interests of Amicus Greens / Green Party

Greens / Green Party USA (the "Green Party") was incorporated in the State of Missouri in 1993 as a national political party under section 527 of the Internal Revenue Code. Green Party candidates have been running for local, state and national office since 1985, and have elected more than a hundred candidates for public office throughout the country. The Green Party candidate for U.S. Senate in Alaska in 1996, Ted Whittaker, polled more than 12% of the vote, finishing ahead of the Democratic nominee. The 1995 Green nominee for Governor in New Mexico polled more than 10% of the vote. The Greens won at least ten elections in 1996, including a majority of the City Council in Arcata, California. The Green Party is committed to the principles of ecology, social justice, grassroots democracy, nonviolence, decentralization, community economics, feminism, respect for diversity, personal and global responsibility and future focus.[1]

The Green Party candidate for President in 1996, Ralph Nader, appeared on the ballot in 22 states and received the fourth highest total nationwide of votes cast for President with nearly 700,000. Mr. Nader however, despite repeated public opinion polls finding that he is the most trusted public individual in the United States, was excluded from the 1996 Presidential debates. The Green Party motion to intervene in the Natural Law Party and Perot lawsuits challenging the exclusion of .third party. candidates to participate in the Presidential debates was denied.

Other Green Party candidates have routinely been excluded from televised debates. For instance, Mark Dunlea, the 1995 Green Party nominee for Rensselaer County Executive (NY) was not allowed to participate in a debate organized and televised by the local ABC affiliate, even though he was an incumbent elected Town Board member and

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[1] Green / Green Party USA paid for this brief to be printed. Rachel Treichler, Esq and Mark Dunlea, Esq. Assisted in preparattion.

had polled 37% of the vote (21,000) in his previous election for State Assembly as the Green and Democratic nominee. Mr. Dunlea polled 11% of the vote for County Executive, a total larger than the margin of difference between the Republican and Democratic nominee.

Statement of the Case

The issue to be decided by the Court is whether the decision of the petitioner Arkansas Educational Television Commission to exclude the petitioner from a television debate violated not only the free speech rights of petitioner Ralph P. Forbes, a candidate for Congress, but also the free election rights of local voters.

Facts of the Case

A publicly owned broadcasting station, Arkansas Educational Television Commission ("AETC"), excluded Ralph P. Forbes, an independent candidate for Congress in the Third District of Arkansas, from a television debate in October of 1992. Even though Mr. Forbes had obtained sufficient signatures to appear on the ballot for the election, AETC excluded Mr. Forbes from the debate because AETC subjectively determined that he did not have sufficient "political viability". The trial court determined that the television debate was a non-public forum, and that Forbes' First Amendment protections had not been violated by the decision to exclude him.

The U.S. Court of Appeals for the 8th Circuit reversed the lower court's determination, finding that the television debate was a limited-purpose public forum "without reservation" and ruled that the Arkansas Educational Television Commission ("AETC") had violated Forbes' First Amendment rights when they excluded him from the debate. Since the 8th Circuit deemed the television debate a limited-purpose public forum, the court stated that AETC had to show a compelling government interest to restrict Forbes' political speech. They

failed to do so. The court concluded that "the reason given for excluding Mr. Forbes (and we accept at face value the defendants' proffered reason) was not legally sufficient under the First Amendment."

Reasons for affirming the right of Candidate Petitioner to Participate in Debate

1. Essential to constitutional government and inherent in the definition of freedom protected in the constitution is the right of the public to free and fair elections.

This Court has held that free and fair elections are a constitutional right. *United States v. Classic*, 313 U.S. 299, 315 (1941) and *Anderson v. United States*, 417 U.S. 211 (1974). The right to participate in the electoral process lies at the very heart of our system of government. Recently, in its decision striking down state attempts to limit the terms of members of Congress, the Supreme Court had occasion to comment on the central nature of the right to vote in our Constitutional system. *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 Sup. Ct. 1842 (1995).

> "*** sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston *** endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.' " 395 U.S., at 541, n. 76, 89 S.Ct., at 1974, n. 76, quoting 2 Elliot's Debates 292-293. Similarly, we observed that "[b]efore the New York convention ***, Hamilton emphasized: 'The true

principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.' " 395 U.S., at 540-541, 89 S.Ct., at 1974, quoting 2 Elliot's Debates 257. Quoting from the statement made in 1807 by the Chairman of the House Committee on Elections, we noted that "restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.' " 395 U.S., at 543, 89 S.Ct., at 1975, quoting 17 Annals of Cong. 874 (1807). Thus, in Powell, we agreed with the sentiment expressed on behalf of Wilkes' admission to Parliament: " 'That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution.' " 395 U.S., at 534, n. 65, 89 S.Ct., at 1971, n. 65, quoting 16 Parl.Hist.Eng. 589-590 (1769).

"Powell thus establishes two important propositions: first, that the "relevant historical materials" compel the conclusion that, at least with respect to qualifications imposed by Congress, the Framers intended the qualifications listed in the Constitution to be exclusive; and second, that that conclusion is equally compelled by an understanding of the "fundamental principle of our representative democracy *** '*that the people should choose whom they please to govern them.*' " 395 U.S., at 547, 89 S.Ct., at 1977. (emphasis supplied) 115 Sup. Ct. at 1851

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) quotes founding father James Madison:

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, *Debates on the Federal Constitution* 575 (1861)."

We deny voters access to the information necessary for an informed electoral decision at our peril. Said Madison, as quoted in *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853 (1982):

> "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Similarly, Mr. Justice Brandeis in *Whitney v. California,* 274 U.S. 357, 375 (1927):

> "Those who won our independence believed * * * that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear

breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Believing in the power of reason as applied through public discussion*, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." (Emphasis supplied)

Although we urge this court to affirm the decision of the appeals court, we also urge that your decision recognize that the fundamental legal issue presented by the case before you is not whether AETC's decision to exclude Forbes from the debate was legally sufficient under the First Amendment right to free speech but rather under the constitutional right to a free election. The issue is whether AETC's actions impinged on the right of the citizens of the state of Arkansas to a free election by curtailing their right to receive essential information about one of the candidates on the ballot.

It submitted that this right to free and fair elections is an intrinsic part of the .freedom. protected by the Fifth and Fourteenth Amendments of the Constitution

"Free elections" are right of each citizen of the Republic, a right needed to make our Constitution work. It is the need for the for the .truth. which is produced and discerned through the process of public debate. This deliberative process of debate that enables the electorate to hear and discern the truth is the essence of our democracy. The process of discerning the truth is not something determined by public opinion polls or evaluation of newsworthiness or the amount of campaign contributions that are received. It is certainly not something to be solely determined, even under the guise of "objective

standards" by those who own or control the media or organize public forums.

2. The State of Arkansas having determined that respondent Forbes had demonstrated a sufficient modicum of support to merit ballot access, other state actors – or individuals with government created or regulated power – ought not be allowed to render that determination moot.

There is an undeniable interest of states and the federal government in limiting ballot access to those who have demonstrated an objectively determined measure of support. In *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), the Court said:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."

On the other hand, that right to control ballot access is subject to strictest scrutiny particularly where it discriminates among competing candidates and parties. *Anderson v. Celebrezze*, 460 U.S. 780; (1983); *Williams v. Rhodes* , 393 U.S. 23 (1968).

> "The broadcaster should not have any right to make a decision as to who can participate in the debate, regardless of the criteria utilized. AETC's opinion on such a debatable matter as the political viability of a candidate for Congress more than two months in advance of the election can not be a sufficient basis

for narrowing the channels of public discourse. They are inherently subjective."

As the Court of Appeals itself noted in its decision upholding Mr. Forbes' right to participate in the debate:

"The real issue, we think, is the legal sufficiency of the reason given for the exclusion. If AETC had considered Mr. Forbes a viable candidate, it would, by its own account, have included him in the debate. There is nothing about being a Democrat or a Republican, a priori, that is relevant here. Rather, AETC's point is that Mr. Forbes, in the opinion of the network, had no chance to win. It therefore decided that its viewers should not hear Mr. Forbes's opinions as part of the debate involving the other candidates qualified to appear on the ballot."

"In a sense, the State of Arkansas had already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican and Democratic nominees. Whether he was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication." *Forbes v. Arkansas Educ. Comm'n*, 93 F.3d 497, 504-505 (8th Cir. 1996).

3. The public's right to free and fair elections requires the inclusion in televised election debates of all candidates who have obtained ballot status.

The exclusion of independent and minor party candidates from televised election debates improperly abridges the rights of the public to free and fair elections. The election process guaranteed by our constitution mandates that the public be given full access to direct communication with all candidates

who have obtained ballot status. Access by all candidates to the "market of ideas" represented by election debates is critical to the public's ability to make meaningful and informed balloting decisions for public officials.

In 1988 and 1992, exit polls showed that in the presidential elections, more voters based their balloting decision on the debates than on any other single factor. In 1992 the television audience for the third and final presidential debate was 97 million viewers. In the words of the Commission on Presidential Debates: "These events have become central education forums which Americans expect, watch, and value."

A candidate's right to participate in televised debate is a necessary concomitant and consequence of the right of the electorate to effectively and intelligently cast their ballot and the need of the nation as a whole for deliberative consideration of public policy choices. Without the inclusion of all candidates in election debates, voters enter polling booths and find names of candidates they know nothing about on the ballot. In such a situation it is impossible to make an informed choice. That is not a free election. It is not an election.

Restrictions on the participation of candidates in election debates should therefore be subject to the strictest scrutiny. See e.g., *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) which held that a California ban on endorsements by party committees abridged the parties right to free speech. In *Eu*, the Court said:

"A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.' " *Tashjian*, supra, 479 U.S., at 221, 107 S.Ct., at 552 (quoting *Anderson v. Celebrezze*, supra, 460 U.S., at 798, 103 S.Ct., at 1575). While a State may regulate the [489 U.S. 229] flow of information between political associations

and their members when necessary to prevent fraud and corruption, see *Buckley v. Valeo*, 424 U.S., at 26-27, 96 S.Ct., at 638-639; *Jenness v. Fortson*, supra, 403 U.S., at 442, 91 S.Ct., at 1976. Tthere is no evidence that California's ban on party primary endorsements serves that purpose." 489 U.S. at 228, 229.

In our day and age, the need to communicate over the public airwaves is an inseparable part of the electoral process. At the time the constitution was drafted, in 1787, voting was by meetings with speeches followed by voting.

The election process guaranteed by our constitution mandates that the public be given full access to direct communication with all candidates in order to allow the public to make informed decisions as whether or not to vote, and for which candidates. Given the monopoly control of information by the media, to permit broadcasters to select the candidates the public learns about completely nullifies our election processes.

The act of exclusion of a candidate from a debate is a fatal blow to the candidate's chances on election day. Exclusion implies that the ideas of the excluded candidate are too extreme, too radical, or too uninformed. It implies that the candidate does not have significant popular support and that a vote for him/her, rather than one of the included candidates, will be a wasted vote.

Because of the enormous cost of purchasing television air time, it is not an answer to remit candidates to purchase time as a substitute for free debate time. Free elections are the core provision of our constitution. To require candidates to buy a piece of the public airwaves at enormous sums in order to communicate their ideas is a travesty of the constitutional right to a free and fair election.

Neither is the limited obligations of the broadcasters to provide public access to the airwaves under the fairness doctrine contained in Section 135 of the Federal Communications Act, 47 U.S.C. Sec. 315 (the .fairness doctrine.) a sufficient to meet the constitutional requirements for free and fair elections. The fairness doctrine allows broadcasters to deny access to those whom in their subjective judgment (or calculated self-interest) are not "news" or "newsworthy". This ability under the fairness doctrine of broadcasters to select the candidates the public learns about nullifies the entire election processes and is completely contrary to our entire system of government.

"No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, they must live. Other rights, even the most basic, are illusory in the right to vote is undermined." *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (U.S.Tenn. 1992) 119 L.Ed.2d 5, 60 USLW 4393, 20 Media L. Rep. 11 37 Decided May 26, 1992 citing *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964).

The legislature is the body under our constitution that has the right to determine the requirements to be a candidate in an election. A candidate who meets the legislature's requirement for ballot access – generally the gathering of large numbers of signatures from registered voters signifying their interest in the candidate's participation in the election – must be able to communicate his or her ideas to the public without paying an exorbitant access fee to the media.

A system which effectively requires a candidate to buy advertising time if his or her views are to receive any public airing leads to a perception of corruption in the electoral process when the amount of money required for such purchases is far beyond the reach of individuals not allied with substantial monetary resources.

This Court recognized in *Buckley vs. Valeo,*. 424 U.S. 1, 46 96 S.Ct. 612, L.Ed.2d 659, 76-1 USTCP 9189, that "(t)he electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."

Surely the Court would not hold that the right of effective political speech is a right only of the wealthy. Madison in Federalist Papers #57 said it well:

> "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of the country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."

The First Amendment does not give broadcasters a license to exclude candidates from communicating with the public. Should the public's constitutional right to free and fair elections conflict with the first amendment rights of broadcasters, the rights of the public to free elections are paramount. *CBS, Inc. v. F.C. C.*, 453 U.S. 367 (1981):

> "It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market ***. It is the right of the public to receive suitable access to social, political esthetic, moral, and other ideas and experience which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S., at 390, 89 S.Ct., at 1806.
>
> "The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by Sec.

> 312(a)(7). We have recognized that "it is of particular importance that candidates have the *** opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo*, 424 U.S. 1, 52-53, 96 S.Ct. 612, 651, 46 L.Ed.2d 659 (1976). Indeed, "speech concerning public affairs is *** the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."

Mr. Justice Holmes cautioned against taking even Constitutional principles to "drily logical extremes." *Noble State Bank v. Haskell*, 219 U.S. 104; (1911) This is particularly true when competing interests are at stake that need to be harmonized, not lobotomized.. Colliding in the matter at bar are claims of free speech by those to control the forum, access to means of speech by candidates in the electoral process and the increasingly undisputed dominance of the political process by monied interests who seek to equate money with speech. The Green Party submits that when balancing these competing interests that another – even more fundamental – right must not only be harmonized in, but predominate, the result. That is the interests of the public in a free and meaningful election process.

By upholding the fairness doctrine, this Court has already demonstrated that the broadcasters who are the beneficiaries of regulatory largess, have a reciprocal obligation to the public

weal. That obligation is to foster the market place of ideas . not auction it off to the highest bidder.

Conclusion

It is respectfully submitted that the judgment below be affirmed insofar as the respondent's right to be included in the campaign debate is concerned.

Dated: New York, New York
June 27, 1998

Respectfully Submitted,

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No. 96-779

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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* Supreme Court Rule 37.6 Statement: No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

1. The Brennan Center for Justice is a non-partisan institute formed by law clerks who served Justice William Brennan, Jr., during his thirty-four years as an Associate Justice of the United States Supreme Court, and the faculty of New York University School of Law. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a genuinely independent center of thought on significant legal issues affecting American life. He particularly insisted that no special deference be paid to his views, or to his opinions. Justice Brennan played no role in the formulation of this brief, or in the decision to file a brief in this case.

The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. In keeping with Justice Brennan's legendary contributions to the law of American democracy, the Center has chosen to concentrate initially on a Democracy Project.

2. The Brennan Center believes that democratic institutions function best if they are structured to be inclusive and to give citizens the widest range of political choice. In the electoral context, this means assuring that the government creates and protects a process providing fair and realistic opportunities for candidates to enter the electoral process and to disseminate their messages to potential voters. The United States Constitution, especially the First Amendment, should be construed, therefore, to impose a heavy burden on any governmental decision that restricts the opportunity of a candidate to convey his message and the opportunity of potential voters to hear it, especially when other candidates are receiving the benefit of government assistance being withheld from a competing candidate.

The Brennan Center also recognizes that practical constraints require some choices in allocating government

resources, including those devoted to the electoral process. For example, the Brennan Center supports campaign finance reform, including some degree of public financing of candidates' campaigns. This Court has held that public financing schemes may legitimately distinguish among candidates who are eligible for such government support, so long as the government applies pre-established objective criteria. *Buckley* v. *Valeo*, 424 U.S. 1, 90-108 (1976). Those criteria, though, may not reflect government favoritism toward certain candidates or parties. Any system that actually or potentially tilts in favor of candidates based on such favoritism would threaten the heart of the democratic process.

Like public financing, inclusion in a candidate debate confers a government benefit on certain candidates. Both government programs — a state-sponsored debate and a state-sponsored campaign subsidy — distribute public resources to electoral candidates. Either form of government participation in the electoral process may advance important public interests, but any such program must take care not to discriminate unduly against "disfavored" candidates or parties.

3. The judgment entered below is correct, since the petitioner, a state-owned and operated television system ("the Network"), did not comport with its constitutional obligation to formulate permissible, objective criteria before it was presented with the request by candidate Forbes to participate in the debates it sponsored. It was not sufficient simply to make a subjective, *ad hoc* judgment about whether his campaign was "newsworthy."

The Eighth Circuit's opinion sweeps too broadly, however, in appearing to foreclose government agencies from drawing any lines distinguishing among candidates who happen to satisfy the bare minimum qualifications for access to the ballot. The First Amendment does permit a government agency to fashion legitimate, viewpoint-neutral, and objective criteria to make the allocation decisions that may be necessary

as a practical matter. The Eighth Circuit's rationale thus improperly casts doubt on the validity of any feasible system of public financing of elections and, indeed, is inconsistent with *Buckley* on this point.

We submit this brief to flag the negative ramifications of any decision adopting an absolutist stance: either adopting the Network's argument that it was entitled to make its decision virtually without constitutional constraint or embracing without qualification the Eighth Circuit's rule requiring virtually unfettered access to government-sponsored or government-hosted campaign debates.

The parties have consented to the Brennan Center's participation as *amicus curiae*. Pursuant to Rule 37, letters reflecting the consent of the parties have been filed with the Clerk.

INTRODUCTION

There are at least three kinds of government involvement in a political campaign that require the government to identify or distinguish among candidates. First, the government must identify candidates and create a ballot. Second, the government must determine which candidates should have access to publicly sponsored campaign events. Third, the government must allocate public campaign subsidies, if any. While the principles of political openness and electoral fairness codified in the First, Fifth, and Fourteenth Amendments ultimately govern all three choices, the precise levels of regulatory authority and constitutional constraint necessarily differ for each set of decisions.

The government's own discretion is, and should be, at its lowest ebb in deciding who may be a candidate. This Court has recognized that, once a prospective candidate demonstrates a minimal level of electoral support, the candidate is constitutionally entitled to a place on the ballot. *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

Government power is rightly at its highest level in allocating campaign subsidies among the candidates. While constitutional limits undoubtedly exist, this Court has recognized that, in an effort to assure the efficient use of scarce resources, the government may allocate campaign subsidies on the basis of previously established and objective criteria, such as past electoral success and current electoral support. *Buckley* v. *Valeo*, 424 U.S. 1, 90-108 (1976).

When, however, government-owned broadcast media choose to sponsor campaign events, such as debates between or among candidates, a more complex governmental choice must be made. In such settings, the government-owned television station acts both as a First Amendment speaker itself and as the creator of an important public forum for the speech of others. If the public broadcast station is viewed solely as a First Amendment speaker, the broadcaster would be entitled to exercise virtually unlimited discretion to determine which candidates are invited to participate in a debate. If, on the other hand, the public broadcaster is viewed solely as a conduit for the speech of the candidates, the broadcaster would become subject to "public forum" doctrine requiring government to provide equal access to all candidate/speakers, even when such equal access would materially inhibit the potential for effective debate.

The Brennan Center submits that the level of choice open to a public broadcaster in such a setting should reflect both its role as a First Amendment speaker and its public forum role as a neutral "gatekeeper" for the speech of others. See generally *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994).

At a minimum, such a government speaker/gatekeeper must operate pursuant to preexisting, objective rules setting forth criteria for participating in such a debate. Resort to amorphous standards, such as "newsworthiness," or "public interest," vests a governmental gatekeeper with excessive

discretion, and invites viewpoint-based discrimination (however subtle or hidden) against a third-party or independent candidates.

This kind of political objectivity, however, does not justify a rigid rule requiring automatic inclusion of all candidates in such a debate. That extreme position, which is essentially the approach taken by the court of appeals, fails to accord any weight to the public broadcaster's need to exercise some editorial discretion in order to assure that the debate process offers candidate and voters a meaningful and intelligible airing of views.

Where inclusion of all candidates would materially inhibit a broadcaster's ability to sponsor a meaningful debate calculated to assist voters in casting an informed ballot, it would be self-defeating to force the broadcaster to choose between no debate at all, or an exercise that, in the broadcaster's view, would not provide the electorate with helpful information. In some settings, for example, the sheer number of candidates might make a debate format unwieldy. In other settings, a candidate's level of support might be so minuscule as to render inclusion in the debate a diversion.

SUMMARY OF ARGUMENT

1. The Network, an agency owned and operated by the State of Arkansas, sponsored a candidate debate and excluded respondent Forbes from participating. It did so without relying on pre-established, legitimate, objective criteria. We agree with the judgment below that as a state actor the Network was bound by First Amendment constraints both in formulating the criteria it would use to select participants and in applying those criteria. The Eighth Circuit, therefore, correctly rejected the Network's arguments asserting virtually unrestrained discretion.

2. The Network's reliance on an essentially subjective and *ad hoc* approach to distinguishing among candidates — their relative "newsworthiness" — fails to pass constitutional muster. The First Amendment requires more careful and more verifiable standards for making that decision. Those standards must be clear, viewpoint-neutral, objective, and pre-established.

Since the Network here had failed to adopt permissible, objective criteria when it decided to sponsor debates, it was compelled to rely on *ad hoc* and subjective evaluations once candidate Forbes sought to participate. The court of appeals ruled properly that the Network's resort to subjective rationalizations did not satisfy the constitutional standard.

In this case, the Network excluded Mr. Forbes under a purely subjective, *ad hoc* standard that impermissibly favored Democrats and Republicans over all other candidates. The Network automatically afforded major party candidates access to the debates, regardless of their level of support in the community. J.A. 133-37. Thus, the Network apparently invited a Republican candidate to a debate, despite his having raised less money and demonstrated less public support than Mr. Forbes. J.A. 133-34, 175. Moreover, the Network disregarded Mr. Forbes, despite his having received 46 percent of the vote in a statewide three-candidate Republican Primary race for the Lieutenant Governor in the 1990 election cycle. J.A. 149-54. The Network's failure to operate pursuant to pre-existing objective standards, and its bias in favor of the major parties, rendered its gatekeeping decisions unconstitutional. Thus, the judgment of the Eighth Circuit should be affirmed.

3. Nevertheless, the Eighth Circuit went too far in appearing to impose an unadorned ballot-certification standard as the sole measure for inclusion in a government-sponsored candidate debate. The Eighth Circuit's blanket rule fails to

take account of legitimate public interests that a public broadcaster may seek to advance. This Court should clarify that *some* distinctions among candidates are permissible, but they must reflect previously established, legitimate and objective standards that assure that the public broadcaster is not discriminating on partisan or philosophical grounds or unduly constraining the flow of information and ideas to voters.

ARGUMENT

I. THE EIGHTH CIRCUIT CORRECTLY REJECTED THE NETWORK'S ARGUMENT THAT THE FIRST AMENDMENT ALLOWS A STATE-OPERATED TELEVISION STATION TO MAKE ESSENTIALLY STANDARDLESS, SUBJECTIVE DISTINCTIONS AMONG CANDIDATES ALLOWED TO APPEAR IN A GOVERNMENT-SPONSORED CAMPAIGN DEBATE.

1. The Network urges that a public broadcaster's decisions supported only by subjective assertions of "newsworthiness" or "editorial control" should always suffice to pass constitutional muster. See, *e.g.*, Pet. Br. at 3. The Network's oft-repeated reliance on the concepts of newsworthiness and editorial control is particularly inappropriate in this case. From the arguments of the Network and its *amici*, a reader might be led to believe that this case poses a challenge to a traditional newscast — something along the lines of the MacNeil-Lehrer NewsHour. This dispute, however, does not concern an editor's decisions concerning the top news stories of the day. This is a case in which the public broadcaster is acting consciously as a gatekeeper, allowing some people to speak directly to the public to promote their candidacy for public office, while denying other candidates that same opportunity.

The Network sponsored a debate featuring certain candidates for political office. By providing that opportunity

for the chosen candidates to speak to the television audience, the Network hoped to increase voter interest in the election, and to make the views of those candidates more widely known and understood. There is nothing nefarious about those goals — indeed, they are praiseworthy. Make no mistake, though: this was no mere news show.

This dispute challenges a government body's decision to play a significant role in the electoral process, and to favor some candidates over others in doing so. It should be judged by constitutional standards that must guide government action, not by inapplicable concepts of "newsworthiness" and editorial autonomy.

2. The Network in effect seeks an exemption from the normal constitutional standards applicable to government bodies, simply because it has undertaken to perform functions that private organizations also perform. The Network cannot so easily blink away the undeniable and constitutionally crucial fact that it is a state actor and thus is subject to constitutional constraints that do not bind editors and publishers working in the private sector.

The Network concedes that it "is an agency of the State of Arkansas" and that its operations are under the control of a board of directors all of whose members are appointed by the Governor of Arkansas with the advice and consent of the State Senate. See Pet. Br. at 6, citing Ark. Code Ann. §§ 6-3-101, 6-3-102, 25-16-804(b)(1). Thus, it is apt to recall here what the Court observed in applying the First Amendment to the resource allocations structured by the University of Virginia in *Rosenberger* v. *Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, ___, 115 S.Ct. 2510, 2513 (1995): As "an instrumentality of the" State, the Network is "thus bound by the First and Fourteenth Amendments."

Moreover, the Network also blurs important constitutional distinctions in claiming the same right to editorial autonomy enjoyed by private broadcasters — or even by "public"

stations operated by non-governmental not-for-profit corporations. The crucial distinction is between the State as speaker and the State as regulator of the opportunities of *others* to speak.

The Court carefully drew this distinction in *Rosenberger*. Pointing to such cases as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court explained that, "when the State is the speaker, it may make content-based choices" and may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey *its own message*." 115 S. Ct. at 2518 (emphasis added). The Court then warned unambiguously, however, that it "does not follow" that a state agency has the same autonomy when the government "instead expends funds to encourage a diversity of views from private speakers." *Id.* at 2519.

The Network obscures the point by asserting, in reliance on a decision involving a privately owned broadcast system, that the "property here is a broadcast station, whose programming is not traditionally open to the public." Petitioner's Br. at 23., citing *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973); *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). Televised campaign debates constitute a unique form of programming when orchestrated by a state agency. Forbes was not being excluded from participating in recreational or educational programming. He was not even demanding fair treatment in response to some editorial position the Network's managers took in endorsing a rival candidate — an activity that might raise other constitutional concerns. Rather, he was seeking to share the opportunity that the Network was extending to other speakers, the competing candidates, to face the voters directly in trying to persuade them to support a particular candidate's election.

Thus, there is no need to determine more broadly whether a state-operated television station is generally a public forum

or a "limited purpose" public forum as the Court has developed those concepts. What is dispositive here in triggering searching constitutional inquiry is that this state agency elected to open up its facilities to some speakers for the undeniable purpose of allowing them, in a debate format, to address the viewing public. Under any of the approaches expressed in various opinions in cases such as *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992), and *Lee* v. *International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992), that decision by state employees opened up a forum for candidates to address matters of public concern and to engage in public discourse. That decision made the Network's selection of eligible participants a matter of First Amendment scrutiny.

Forbes was excluded from a televised debate between congressional candidates, a program specifically designed by a state actor to influence elections. In a context where the government has a hand in influencing the democratic process itself, "both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on their power." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-18, at 1097 (2d ed. 1988).

3. "Newsworthiness" and corresponding notions of editorial control are not discernable, objective standards sufficient to assure that a state-operated television station is drawing legitimate distinctions in selecting the candidates who are to be provided with this forum. *Cf. Reno* v. *ACLU*, ___ U.S. ___, No. 96-511, slip op. at 28 (June 26, 1997). Those concepts surely are not adequate substitutes for forum analysis or the other elements of First Amendment scrutiny. Considerations such as newsworthiness and the need for editorial control may play a role in the application of the constitutional standard (for example, a court might consider those concerns as it weighs the importance of government interests sought to be advanced by a public broadcaster's

policies), but those concepts do not represent a shortcut that would allow a court to bypass otherwise applicable standards of constitutional scrutiny.

The Network's preferred rule would amount to unreviewable discretion for government-owned broadcasters in selecting the speakers who may use government-owned facilities. There is no basis in this Court's jurisprudence for such a broad exception to the presumption that state actors are subject to constitutional scrutiny for their policies and actions.

The Network's argument is unprecedented — and unjustified — even in the limited terms in which it is couched. But larger democratic values are also at stake here. This is a case about elections as much as it is about broadcasters. The Court should not lose sight of the importance of candidate debates in the eyes of voters. When those debates are created and disseminated with the imprimatur of the State, they take on even more significance. These facts enhance the need for careful constitutional scrutiny.

4. The Eighth Circuit, therefore, was correct in rejecting the Network's arguments seeking to avoid any constitutional scrutiny or to apply only the most deferential review. When the government decides to create a forum for debate within an election campaign, the selection of candidates should proceed from identifiable, articulable standards. The government should not be permitted to rely on amorphous concepts that are so flexible that they can be invoked to justify any decisions, however inconsistent.[1]

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[1] For example, one of the Network's asserted reasons for excluding Forbes was that he only raised $9,000, but the Network apparently had invited a Republican nominee who had only raised $6,000 to a similar debate in the past. See J.A. 133-134, 175. When challenged with this discrepancy, the Network's only response was that "the amount of money raised was only one of the many factors [it] considered" in its decision to exclude Forbes. See Pet. Rep. Br. in

This is not to suggest, as the Network claims, that genuine editorial decisions should be open to second-guessing by the courts. It does not mean that public broadcasters can be haled into court to defend every programming decision they make. See Pet. Br. at 46. As we have explained, this is not a case of an editorial decision to run one news story (or educational program) instead of another. Rather, this is a case about direct governmental involvement in elections — favoring some candidates over others — and that governmental initiative goes to the core of our constitutional democracy. More careful constitutional scrutiny is warranted under these circumstances.

5. At its most basic level, the First Amendment prohibits government agencies from controlling a speaker's access to an otherwise available rostrum because of the content of the speaker's political philosophy. This restriction applies even when the government agency contends that it has scarce resources — including the claim of limited air time advanced here by the Network — and must draw upon some criteria to make the allocation. "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 115 S. Ct. at 2519.

This kind of concern is relevant in deciding whether the Network lived up to its constitutional obligations in limiting the debate to just the two major parties' candidates. This Court has never given the government discretionary powers to favor Republican and Democrat candidates, as such, when structuring elections. On the contrary, it has protected the diversity of political viewpoints and the rights of independent

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Support of Petition at 3. This rejoinder simply demonstrates the weakness of the Network's position. If the asserted factors cannot be used to predict the judgments of a state actor, they are no standards at all, and merely restate the government's claim to unreviewable discretion.

candidates. In *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 (1983), the Court recognized that "political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream" (citing *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979)).

In fact, the Court expressly held that burdens falling on independent candidates deserve a heightened level of scrutiny, and that their First Amendment rights should merit special protection. "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson*, 460 U.S. at 793 n.16. The government may not impose unequal burdens on new or small political parties or independent candidates; by their very nature, such burdens impinge upon associational choices protected by the First Amendment. *Id.* at 793. The government, in short, may not simply insulate Republican and Democrat parties and candidates from external competition. *Id.* at 802.

In the Court's most recent decision addressing state regulation of elections, the Court sustained the power of a State to prevent political parties from insisting on including in the ballot their endorsement of another party's nominee. *Timmons* v. *Twin Cities Area New Party*, ___ U.S. ___, 117 S. Ct. 1364 (1997). While the Court concluded that the States have legitimate interests in avoiding excessive factionalization of the electoral system, the Court reaffirmed its string of precedents insisting that the "strong interest in the stability of their political systems * * * does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence." *Id.* at 1374. In addition, the Court explained that "[b]allots serve

primarily to elect candidates, not as fora for political expression." *Id.* at 1372.

Here, by contrast, we are talking about a state agency's decision to exclude a minor party's competing candidate from access to the "forum for political expression" created by an organ of the State of Arkansas. The burden must rest on the shoulders of the Network, therefore, to establish that both the substance of its decision and the process by which it reached that decision satisfied the prohibitions of the First Amendment.

II. STATE-OWNED TELEVISION STATIONS MUST ARTICULATE AND APPLY PRE-ESTABLISHED, VIEWPOINT-NEUTRAL, OBJECTIVE CRITERIA WHEN DISTINGUISHING AMONG CANDIDATES BEING SELECTED TO PARTICIPATE IN BROADCAST DEBATES.

1. A broadcaster sponsoring and televising a campaign debate effectively selects and promotes candidates for the attention of voters. That selection, when done by a state actor, must be based on articulable, objective standards. Distinctions that favor dominant parties over new parties or independent candidates must be carefully scrutinized to avoid an unwarranted preference for the *status quo* by those currently in power.

This case involves "core political speech" at the heart of the First Amendment. It intertwines the right of legally qualified candidates to communicate their messages effectively, without discriminatory government restrictions, and the right of the electorate to obtain access to information necessary to the effective functioning of democratic institutions.

When addressing restrictions on activities involving speech even in less compelling contexts, the Court has repeatedly insisted that the government officials must be

guided by clear, precise, and legitimate standards in deciding how to apply regulatory decisions. The First Amendment simply does not tolerate entrusting to government agents, no matter how honestly motivated they may be, the standardless discretion to decide when and how to restrain public speech.

The Court's First Amendment jurisprudence reflects a consistent line of precedents striking down on "vagueness" grounds the assertions by government officials that they enjoy discretion to decide when and how to draw lines affecting the right to speak, even in the absence of objective and legitimate legislative standards.

Thus, for example, in *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 131-33 (1992), the Court struck down a parade permit ordinance that allowed administrative officials too much discretion to vary the permit fee. The fatal vice was that the ordinance itself "did not prescribe adequate standards for the administrator to apply when he sets a permit fee"; as a consequence, nothing in the governing law "or in its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees." See also *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Smith* v. *Goguen*, 415 U.S. 566 (1974); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (all invalidating restraints on some form of speech because the legislature failed to prescribe adequately clear criteria for the regulation); *cf. Reno v. ACLU*, slip op. at 24-28 (discussing problems inherent in vague speech restriction).

The Network rightly lost below, because it admittedly did not apply pre-existing and objective criteria of the sort required by the "vagueness" doctrine.

2. In selecting candidates to be invited to a state-sponsored campaign debate, a state-owned broadcasting station must be bound to use objective and pre-established criteria.

The concept is nothing new, nor should it constitute a burden as insurmountable as the Network fears. The Network need only look to the briefs filed by its own *amici* to find examples of objective criteria that are currently in use for candidate selection.

Federal regulations already hold broadcasters, newspapers, magazines and non-profit organizations that structure televised electoral debates to such objective standards, as noted by one of the Network's *amici*. See Commission on Presidential Debates Am. Br. at 2, citing 11 C.F.R. §110.13. (We reprint this regulation in full in Appendix A, *infra*.) The applicable federal regulation requires that organizations that stage presidential debates must select participants based on "pre-established objective criteria," and it pointedly prohibits selection solely based on party affiliation:

> "For general election debates, staging organization(s) shall not use nomination by any particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. §110.13(c).

Staging organizations may not pick and choose among candidates on an *ad hoc* basis, as the Network apparently did here, nor may they simply invoke journalistic judgments of indeterminate scope to justify a particular decision after the fact.

For example, petitioner's *amicus* Commision on Presidential Debates, a not-for-profit organization that sponsors the quadrennial presidential debates, informs the Court that it

> "has long recognized the need to develop, and has developed, nonpartisan criteria to ensure that it identifies all of the candidates in a particular election year who, regardless of party affiliation and in light of the educational goals of the CPD's debates, properly should

> be invited to participate in those debates." Commission on Presidential Debates Am. Br. at 2-3.

Although the Commission states that it has "eschewed a mechanical approach to making this decision," it reports that it has had no difficulty articulating "objective" criteria to guide its selections. Indeed, the Commission's guidelines refer to a variety of what they characterize as "objective considerations," including "evidence of national organization," "organization in a majority of congressional districts," "[e]ligibility for matching funds" from the FEC, "[c]olumn inches on newspaper front pages," "findings of significant public opinion polls conducted by national polling and news organizations," and "[r]eported attendance at meetings and rallies."[2]

Appearing as another *amicus curiae* to support the Network, the City of New York calls attention to the provisions of its local law under which candidates for major City offices must participate in public debates, if they are to claim public financing. A government agency selects the sponsors of the debates, who must be independent of any of

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[2] The fact that the criteria are objective, of course, does not necessarily mean that they are constitutionally legitimate or assure that they are appropriately applied. For example, despite its "objective" criteria, the Commission on Presidential Debates excluded H. Ross Perot from the 1996 presidential debates, even though he already had qualified for government funding to support his presidential bid. If the decision to exclude Perot from the debates had been made by a publicly owned broadcast station, it would have violated the First and Fifth Amendments.

As discussed *supra*, pp. 3-5, the government has a narrower degree of constitutional leeway in regulating access to government-sponsored campaign debates than it does in allocating public resources, such as taxpayer financing, among qualified candidates. Thus, any candidate who qualifies for public funding *a fortiori* must be included in any publicly sponsored candidate debate.

the candidates or political parties. Most important, however, the City insists that the "[p]otential sponsors must set forth objective, non-partisan, and non-discriminatory criteria that they intend to use to identify leading contenders" to be invited to participate. City of New York Am. Br. at 3.

If private actors can and do develop objective, pre-decision standards to constrain their selection of candidates to invite to their debates, it is only reasonable to insist that state actors should abide by the same principles. After all, their influence on elections is subject to constitutional scrutiny, and it is especially vital to assure that state officials' intervention in the electoral process is even-handed. This constitutional requirement would prevent the perception, as well as the real possibility, of discrimination against independent candidates and parties.

Contrary to the Network's concerns, having an articulable standard based on pre-established, objective criteria does not unreasonably burden its "editorial" decision-making. State broadcast agencies elsewhere already adhere to similar standards for distinguishing among candidates. For example, another *amicus* appearing to support the Network, New Jersey's state-owned television station, currently admits participants to televised debates based on their eligibility for public funding. "As such, neither a candidate's political party affiliation, political philosophy [n]or electoral viability are relevant considerations. This scheme is constitutionally valid," the State emphasizes, "because it is based upon an objective criterion." State of New Jersey Am. Br. at 1-2.

3. The specific, pre-established criteria that several of the *amici* have developed are a far cry from the kind of standardless, subjective, *ad hoc* test that the Network used in deciding to exclude Forbes from its debate. As the Network describes the inquiry, its managers turned Forbes aside because of the "feeling among both the professional staff at AETN" and the local Associated Press bureau chief that time

had to be allocated to just two candidates, and the Network's executive director then concluded that, in her "professional editorial judgment," Forbes "was not newsworthy enough to be invited to the debate." See Pet. Br. at 14, 17, 3.

At trial, the Network officials testified to a series of factors that they considered in reaching that conclusion. See Pet. Br. at 15-16. Some of those factors may be legitimate; others may be too subjective. There is no doubt, though, that the decision was an *ad hoc* one that favored the major party candidates over a well-known third party candidate.

As we have shown, the Network's own *amici* have endeavored to develop objective standards for implementing this important undertaking and to avoid the dangers of relying solely on *ad hoc*, subjective considerations. The Network, by contrast, never bothered to prescribe and then to apply legitimate, objective criteria that would guide its exercise of discretion in an area of core First Amendment concern. Despite ample notice in *Buckley* and elsewhere of the need to identify permissible objective criteria for measuring a candidate's political viability and corresponding entitlement to electoral benefits, the Network insisted on applying a subjective, *ad hoc* approach. That approach conflicted with the Network's obligations under the First Amendment and, as the court of appeals held, entitles Forbes to at least nominal damages.

III. THE EIGHTH CIRCUIT'S UNNECESSARILY BROAD HOLDING SHOULD BE RECONCILED WITH THIS COURT'S DECISION IN THE CONTEXT OF PUBLIC FUNDING OF CAMPAIGNS THAT THE GOVERNMENT MAY DISTINGUISH AMONG CANDIDATES IF IT APPLIES PRE-EXISTING, NEUTRAL, LEGITIMATE, AND OBJECTIVE CRITERIA.

1. While the Eighth Circuit was right in ruling against the Network, the standard it imposed for including candidates is inappropriately — and unnecessarily — broad. By requiring state-owned television stations to grant air time to all ballot-certified candidates whenever a station sponsors a campaign debate, the Eighth Circuit's holding improperly conflates the three sets of government decisions concerning participation in a political campaign. The government may, and should, apply different criteria to its decisions regulating access to the ballot, access to publicly funded debates, and access to public financing.

Thus, the Eighth Circuit's broad holding, if extended to challenges to public funding of campaign finance, could be construed to require that benefits such as public funds be made available to all candidates authorized to appear on the ballot, irrespective of their demonstrated level of public support or realistic viability as candidates with a reasonable prospect of achieving victory. A blanket rule such as the Eighth Circuit's implies that no government agency has a right to deny public funding, or other public benefits, to candidates once they have been legally certified to appear on the ballot. Such a rule could inhibit the development of public funding schemes that appropriately distinguish among candidates based on objective criteria of viability, such as those upheld in *Buckley*.

In *Buckley* the Court decided that ballot-access thresholds should not necessarily be equated with eligibility to receive

other election-related benefits. The Court explicitly recognized a "significant distinction" between the two scenarios. *Buckley*, 424 U.S. at 101. Under the federal campaign financing program, candidates of new parties seeking federal funding must show that they secured at least 5% of the popular vote in the prior election. Challengers of the funding scheme argued that the 5% threshold requirement for general election funding was too stringent when compared with that for ballot access, which some States set below 5%. See *id.* at 103. The Court rejected the comparison, differentiating the standard for obtaining ballot access from the right to public funding.

Ballot access, the Court explained, is "a step in any campaign that, with rare exceptions, is essential to successful effort * * * funding is, however, not as necessary as being on the ballot." *Id.*, at 101. Ballot access regulations are necessarily liberal for the sake of encouraging independent candidates to run. Nevertheless, they were not designed for purposes of allocating other electoral benefits, and they do not offer the constitutionally required standard for granting access to televised debates.

By requiring state-owned television stations to grant air time access to any candidate who meets a fairly liberal threshold of ballot certification, the court of appeals failed to recognize that different public interests are at stake when the government structures other election-related programs, including public financing and broadcast debates. The Eighth Circuit should have limited its rationale to rely solely on the Network's failure to have formulated pre-established, legitimate, and objective criteria that would have channeled the officials' exercise of discretion and minimized the risk of content-based or politically motivated discrimination against independent candidates.

2. The case before the Court should lead the Court to reject a rigid rule requiring participation by all candidates.

There is, however, no basis for trying to craft a comprehensive code articulating the objective factors that may or should constrain the government broadcaster's access decision. Rather, public broadcasters are entitled, in the first instance, to have the opportunity to draft objective criteria governing access to publicly sponsored debates.

As broad touchstones for this exercise, it is sufficient to observe that such criteria may not properly turn solely on party affiliation or even on the "likelihood" of ultimate electoral success. Rather, a publicly sponsored debate should include all candidates who have demonstrated sufficient support in the community that their participation in the debate will serve to enhance the voters' understanding of the issues. As history reminds us, a candidate does not need to win an election to be an important participant in the political debates that are the essence of our democratic form of government.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed, but the broad rationale announced by that court should be narrowed and clarified.

Respectfully submitted.

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JULY 1997

Appendix A

Federal Election Commission Regulation

11 C.F.R. § 110.13. Candidate debates.

(a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501 (c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 C.F.R. 114.4(f).

(2) Broadcasters, *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 C.F.R. 114.4(f).

(b) *Debate structure.* The structure of debates staged in accordance with this section and 11 C.F.R. 114.4(f) is left to the discretion of the staging organization(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,
v.
RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICUS CURIAE NATURAL LAW PARTY OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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* Supreme Court Rule 37.6 Statement: No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus the Natural Law Party of the United States ("NLP") is a political party formed in 1992 to bring a scientific perspective into government. The party's philosophy is that where possible, government programs should be based on what has been proven effective. The party believes that science can be a harmonizing influence in a society torn by conservatives warring with liberals. The common ground for agreement ought to be that proven programs should be adopted by government and unproven ones abandoned. The name "Natural Law Party" is itself a reference to the laws of nature — that is, the laws of science.

In the 1996 general election the party's candidate for President of the United States, Dr. John Hagelin, a physicist and university professor, was on the ballot in 47 states and the District of Columbia; in 1996 the party had approximately 400 candidates on the ballot for state and federal office in 49 states plus the District of Columbia.

As a new political party, the NLP has experienced firsthand the obstacles faced by its candidates in attempting to participate in political debates.[1] By virtue of the NLP experience with numerous candidates being denied participation in debates, Amicus believes it may be able to provide the Court with relevant matter not brought to its

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[1] Mr. Marcus, the NLP's counsel of record in this case, was himself an NLP candidate for attorney general of Iowa in 1994 and for U.S. Congress in 1996. He and six other candidates and several political committees are plaintiff/appellants in a case presently on appeal to the 8th Circuit Court of Appeals, *Marcus v. Iowa Public , 93 F.3d 1137 (8th Cir. 1996)*, challenging, on First Amendment grounds, the right of Iowa Public Television ("IPTV") to exclude all but the Republicans and Democrats from debates IPTV sponsored preceding the 1996 general election.

attention by the parties.

The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

SUMMARY OF THE ARGUMENT

Petitioner Arkansas Educational Television Network ("Petitioner" or "AETN") argues that it should be able to make "editorial" judgments about whom to invite to debates based on its assessment of the "newsworthiness" of the candidates. But newsworthiness is a content-based and a viewpoint-based standard, which "cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L.Ed. 2d 487 (1984).

Moreover, the selection of candidates for a debate based on newsworthiness would systematically exclude candidates expressing unpopular viewpoints, thereby preventing challenges to the parties in power and retarding progress in society. It is self-evident that fundamental reform often comes from outside what is already popular or mainstream. As the author of one important treatise on third parties states, "Many of America's noblest and far-reaching advances in freedom were third-party proposals years before the major parties touched them with even the longest pole." J. D. GILLESPIE, POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA, 24, University of South Carolina Press (1993).

Moreover, a policy of limiting debates to candidates who are sufficiently popular in the opinion of government employees flies in the face of the overall goal of the First Amendment of fostering "uninhibited, robust and wide-open" debates, and contradicts a long line of cases stating that placing broad discretion in the hands of government

employees to regulate who gets to speak is impermissible because of the potential for arbitrary action and censorship.

The government has no compelling state interest that would permit it to select candidates for debates based on editorial discretion and subjective criteria. The compelling state interest argument of AETN also fails because, even if such an interest existed, it must be unrelated to the suppression of speech. The state interest that AETN points to is a purported interest in permitting its journalists to make editorial decisions to deny persons deemed unworthy of being in a debate the right to speak.

Finally, AETN is a state actor. While the private press may *sometimes* be in an adversarial role with respect to government, in weighing First Amendment issues it can *never* be assumed that government journalists are in an adversarial relationship with their employers.

ARGUMENT

I. Governmental Debate Sponsors May Not Select Candidates for a Debate Based on a Subjective Evaluation of Whether they are "Newsworthy" or Have Public Support.

Petitioner AETN states, as its basic position, that "AETN's Executive Director Susan Howarth concluded that petitioner [sic] Ralph P. Forbes was not newsworthy enough to be invited to the debate" (Petitioner's Brief, p. 3).

A. As a matter of law, newsworthiness is an impermissible content-based standard.

"Newsworthiness" is a content-based standard which

violates the principle that "government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the University of Virginia*, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700 (1995). The government (including the public broadcasting stations it owns and controls) may not systematically exclude the politically unpopular because such an exclusion is content-based (as well as viewpoint-based, as discussed below). In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804,104 S.Ct. 2118, 2128, 80 L.Ed.2d 772, 786 (1984), this Court stated that speech may sometimes be curtailed when necessary to advance a significant and legitimate state interest, but held:

> [T]here are some purported interests — *such as a desire to suppress support for a minority party or an* ***unpopular cause****, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate they would immediately violate the rule* [that would permit the exclusion of a speaker based on a compelling state interest] [*citing Stromberg v. California*, 283 U.S. 359, 51 S. Ct. 532 (1931) and *Lovell v. Griffin*, 303 U.S. 444, 58 S. Ct. 666 (1938)]. (emphasis added.)

Here, the *expressly stated desire* of AETN is to exclude unpopular candidates and their causes (that is, those without "public support and interest") from the debates, which is directly at odds with this Court's stated view that a *desire* "to suppress support for a minority party or an unpopular cause" is "plainly illegitimate." *Vincent*, 466 U.S. at 804.[2]

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[2] AETN's reliance on the jury's findings (Petitioner's Brief, p. 33) is misplaced; while AETN may not have excluded Mr. Forbes due to its "objections or opposition to his views," AETN makes no effort to conceal the fact that it excluded Mr. Forbes because it deemed him to be without popular support. (*See e.g.*, Petitioner's Brief, pp. 15-16, 25, 34.)

Importantly, in the case of third party candidates, the concepts of "cause" and "candidacy" are intertwined. Such candidacies are often used to "educate the public, to advance unpopular ideas, and to protest the political order, even if the particular candidate has little hope of election. The First Amendment most certainly protects advocacy of this type." *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 627 (2d Cir. 1989).

In *Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L.Ed. 2d 487 (1984), the Court determined that "newsworthiness" is an unconstitutional content-based criterion which "cannot be tolerated under the First Amendment." In *Regan*, which involved the publication of photographs of money, the Court stated:

> [U]nder the statute (18 U.S.C. § 504(1), one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often 'dependent solely on the nature of the message being conveyed.' *Regulations which permit the government to discriminate on the basis of the message cannot be tolerated under the First Amendment.*

Id. (citations omitted.) (emphasis added.)

Any determination by AETN of the "newsworthiness" of

Mr. Forbes is similarly a determination that the content of the AETN debates will be more or less "newsworthy" without him than with him. The court in *Marcus v. Iowa Public Television*, 93 F3d 1137, 1142 (8th Cir. 1996), on facts similar to those of this case, purported to distinguish *Regan* on the grounds that *Regan* was a criminal case. There is no reason to believe that *Regan*'s condemnation of the suppression of speech based on "newsworthiness" applies only in criminal matters, however. This Court in *Regan* held that the regulations at issue were impermissible due to the First Amendment, *not* because the defendant was accused of a crime. A qualified candidate for Congress, seeking to engage in political speech, an activity which is "afforded the broadest protection . . . to assure [the] unfettered interchange of ideas for the bringing about of political and societal changes," *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976), is entitled to as much protection under the Constitution as a criminal defendant accused of using a photograph of currency, as in *Regan*.

The connection between the popularity of candidates and their causes and content-based exclusions was analyzed by the court in *Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y. 1980). *Greenberg* dealt with the 1980 Postal Service Appropriation Act, which granted preferential postal rates to "major" and "minor" parties, but not to "new" parties, as those terms are defined in the Campaign Fund Act, 26 U.S.C. §§ 9001-9013. A party's status as major, minor, or new is determined by the percentage of the popular vote received by the party's candidate for president in the last presidential election (all parties but the Republican and Democratic were "new"). The *Greenberg* court said it was arguable that nationwide popularity did not reflect a judgment based on the content of the mail sent by new parties, but held that:

> To suggest that a regulation that confers benefits on the basis of popularity is not content-based would require the court to draw an artificial distinction between the popularity and the substance of an idea. The political positions of the plaintiffs, in their view, are substantially different from those of the major parties . . . [T]he government has chosen to benefit those with popular views and burden those with unpopular views.

Greenberg, 497 F.Supp. at 775-76. (citations omitted.)

B. Newsworthiness is also an impermissible viewpoint-based criterion.

In *Rosenberger*, the Court distinguished between content discrimination, which the Court said "may be permissible *if* it preserves the purposes of the limited forum," and viewpoint discrimination, which "is presumed impermissible," even in a non-public forum, when directed against speech otherwise within the forum's limitations. *Rosenberger* at 115 S.Ct. at 2517. In *Rosenberger* the Court explained that viewpoint discrimination is "an egregious form of content discrimination." *Id.* at 2516.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), the Court analyzed its holding in *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed. 2d 567 (1985). A church was denied access by a school board to the after hours use of school property, based on a regulation that allowed social, civic, and recreational uses of its schools, but prohibited use by any group for religious purposes. The Court determined that even in the context of a non-public forum, this *viewpoint*

discrimination could not be tolerated; the film the religious group wanted to show covered a topic that was encompassed within the purpose of the forum. The Court stated:

> The principle that has emerged from our cases "is that the First Amendment forbids the Government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."

Id. 508 U.S. at 394, quoting *Vincent*, 466 U.S. at 804.

In his dissent in *Chandler v. Georgia Public Television Communications Commission*, 917 F.2d 486 (11th Cir. 1990), Judge Clark, analyzing a public television station's determination to exclude a Libertarian candidate from a debate based on his lack of newsworthiness, pointed out that it was not the broadcaster's content-based decision to air a debate in the first place that was challenged, but rather the station's decision to exclude the Libertarian viewpoints from the debate. Judge Clark stated:

> [N]omination by a major party bestows a greater likelihood of election than nomination by a less-known party. And the Libertarian candidates might very well be quite far behind in the polls. *But a judgment that their views are not newsworthy is in reality a facade for viewpoint-based discrimination.*
>
> * * *
>
> [A] decision that excludes the Libertarians based on the fact that their views are less newsworthy than those of the major party candidates is necessarily based on an estimation of the value and substance of their views. Because viewpoint discrimination is unconstitutional in any forum, public or otherwise, the district court should have been affirmed [and the Libertarian included in the debate].

Chandler at 493-94. (emphasis added.)

Here the topic Mr. Forbes wanted to cover as a candidate was well within the purpose of the forum, and the only definition of newsworthiness cited by Petitioner (Petitioner's Brief, p. 27, n.5) shows that the exclusion of candidates based on newsworthiness is based on the nature of the ideas expressed. In the absence of any testimony by the witnesses in the *Forbes* case regarding the meaning of the term "newsworthiness," AETN's brief (Petitioner's Brief, p. 27, note 5) resorts to *Marcus v. Iowa Public Television*, 93 F.3d 1137 (8th Cir. 1996) for a definition of that term by Iowa Public Television's expert witness, Professor Barbara Mack of Iowa State University.[3]

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[3] As reported in *Marcus* at 1143-1144, Professor Mack testified:

> When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the—the quality that that person or that news event has.
>
> Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a public conflict? Conflict is one of our classic news values. Impact is a classic news value.
>
> We talk about the news—the news value of locality. As strange as it may seem, a bus accident that occurs in India will get very little coverage in the *Des Moines Register*, but a bus accident that occurs in downtime Des Moines at rush hour, even though it may injure fewer people will get more news coverage. Why? Because its local, and local news has importance.
>
> We talk about the value of human interest, and many of the stories that

Id. at 1143-1144.

Professor Mack's testimony evaluates the "quality" of a political candidate which must necessarily be based on the quality of that person's ideas. In addition, whether the news event [debate] is "going to have an impact on the people," or "change their lives" depends on what is expressed. In addition, Professor Mack states that news feature stories are those that appeal to the characteristics of the human spirit.This too involves an analysis of the viewpoints the journalist expects to be expressed by the candidate. These are precisely the kinds of evaluations condemned in *Vincent*, *Lamb's Chapel*, and *Rosenberger*.

C. The "newsworthiness" standard will systematically exclude all but those who are already popular, thereby preventing challenges to the parties in power.

AETN's decision that Mr. Forbes was not newsworthy was based largely on its determination that he lacked popularity or was not a candidate who had a realistic chance of winning the election in AETN's opinion. (Petitioner's Brief, pp. 10-14). But basing candidate selection for a debate on the existing public support for the particular candidate will systematically exclude minority voices, new and therefore unknown voices, and candidates expressing unpopular viewpoints. A standard of popularity or "newsworthiness" will deny such candidates the opportunity to challenge the major parties, deny the public the opportunity to hear from

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most people think of as feature stories are human interest stories. They appeal to the characteristics of the human spirit.

So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.

those challenging the *status quo*, and the effect will be to retard progress by preventing fundamental reform in society.

It is self-evident that fundamental reform typically comes from outside what is already popular or mainstream. The very nature of reform is that it is something other than what is currently accepted or popular. It is also evident that third parties have been responsible for many of society's most far-reaching reforms. As stated in *Greenberg v. Bolger, 497 F.Supp. 756, 771 (E.D.N.Y. 1980)*, third parties have been responsible for "the development of policies in advance of the time the established parties are ready to act" and they are responsible for the "testing of new programs." The writer of an important treatise on third party activities states: "Many of America's noblest and far-reaching advances in freedom were third party proposals years before major parties touched them with even the longest pole." J. D. Gillespie, Politics at the Periphery: Third Parties in Two-Party America, University of South Carolina Press, 24 (1993). As indicated in Professor Gillespie's book, the Liberty Party struggled against slavery 20 years before the Civil War; the Prohibition Party and the Socialist Party first demanded woman suffrage; the Populist Party first campaigned for equal rights for men and women; the Socialist Party, the Populist Party, and the Prohibition Party first sought to bring initiatives and referendums into the law; the Socialist Party first advocated the graduated income tax, shorter working hours, the abolition of child labor, public works for the unemployed and unemployment insurance; and decades before the Montgomery bus boycott, Communists and other Americans viewed as "radicals" were speaking out strongly on behalf of the rights of African-Americans. *Id.* at 24-27 (1993).

Importantly, the reason such significant reforms originate with the minor parties is *not* coincidence. Underlying the

phenomenon of third party innovations is the recognition that the major parties are driven more by the desire to win elections than by ideology. As Professor Gillespie says:

> The Democrats and Republicans do attract some people for reasons of principle, even ideology; but these major parties mainly seek to win elections and, through winning, to control the political system and its policy processes.

Id. at 12.

Money provided by lobbyists, corporations and wealthy individuals tends to destroy objectivity in political decisionmaking, but money dominates major party politics today, because the money is considered necessary to win elections. *See* Downing, *Candidates For Sale*, *NEWSWEEK*, October 28, 1996, at 24-32, *and* Duffy and Gibbs, *The Money Mess*, *TIME*, November 11, 1996, at 32-41. In 1994, for example, approximately 90% of Congressional races were won by the candidate who spent the most money.[4] The major parties' devotion to "polling" and focus groups, also makes it apparent that the major parties seek to find out what the public wants to hear, and then cater to what is already popular. When the major parties, therefore, base campaigns on what will play well to the voters, and especially to special interest groups seeking to preserve their positions in society, it retards progress in society and causes political campaigns to be devoid of fresh ideas. *See* Jack Anderson and Jan Muller column, *Hardly a Choice Debate Setup*, The Washington

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[4] Statistics compiled by the Center for Responsive Politics ("CRP"), Washington, D.C., a non-profit educational organization. Other statistics of CRP on the importance of money in winning elections is at http://www.crp.org/spend.htm.

Post, September 26, 1996 ("[I]n an election year that's generally devoid of new ideas, the voters of America deserve to see what choices are available outside the two major parties"); *and see* Coleman McCarthy column, *A 'Minor' Problem with the Debates*, The Washington Post, October 1, 1996 ("Presidential debates ought to be about the choices of ideas in the marketplace of politics, with the aisles as wide as possible"). As a result of these factors, third party and independent voices are, and long have been, necessary to inject new theories and bring new ideas to the public. And the value of having these diverse perspectives lively in the political dialogue has long been recognized by this Court. As former Chief Justice Earl Warren said:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . .The absence of such voices would be a symptom of grave illness in our society.

Williams v. Rhodes, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) *quoting Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (opinion of Warren, C.J.).

Unfortunately, the testimony in this case reveals that the major parties are not alone in catering to what is popular. When broadcasters require that candidates have popular support *before* they can gain access to the media, it poses a formidable catch-22 for third party candidates and for the introduction of new ideas in society since, in an electronic age, new ideas and new candidates need broadcast exposure in order to gain popular support for these ideas. *See Greenberg v. Bolger*, 496 F.Supp. 756, 776-776 (E.D.N.Y. 1980).

AETN seeks, in part, to justify its decision to allow only candidates with popular support to participate in debates based on the fact that the Associated Press or other private broadcasters weren't giving Mr. Forbes coverage. But the *private* broadcasting industry requires public support because commercial considerations, such as the need to have high ratings or to attract advertising revenues, dictate that candidates already in the public eye be featured in the media and media-sponsored debates. *See, Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486, 492 (11th Cir. 1990) (Clark, J. dissenting). Public television, however, is different. Public television *is* the government. It uses the people's tax money and has government resources that should not be used to favor or endorse particular candidates. Moreover, public television was not created with the same considerations as privately owned commercial broadcasting, and many of the arguments of Petitioner, and the government agencies that support Petitioner, are simply at odds with public television's laudable original goals and purpose.[5]

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[5] The *Statement of Principles of Editorial Integrity in Public Broadcasting* provides a brief history of public television. It relates that the Carnegie Commission on Educational Television

> "proposed a new kind of television — public television which was to include all that is of human interest and importance which is not at the moment appropriate or available for support by advertising . . . a new system not patterned after the commercial system . . . or any other existing system." (App. 91a).

The *Statement of Principles* also states that "[p]ublic broadcasting was created to provide a "wide range of programming" and one "which provides alternatives in quality, type and scheduling [to commercial broadcasting]." (App. 70a).

As stated by Judge Clark in his dissent in *Chandler* (a case where a public broadcasting station hosted a debate between a Republican and a Democrat, but excluded the Libertarian, the only other candidate on the ballot):

> The purposes behind public broadcasting are significantly different from those behind commercial, competitive television. Public broadcasting is premised on the belief that the free market will not provide all of the programming and information necessary for an educated public. Thus, many programs that would fail miserably to pay their own way on the private networks appear on public television. The political debates at issue appear to be a case in point. *In the context of noncompetitive programming, the government's stated rationale for excluding [candidates] — that their views are less newsworthy than those of other candidates — seems especially weak and not a little ironic.*

Chandler, 917 F.2d at 492 (emphasis added).

As Judge Clark observes, such selective exclusion results in an agency of the state effectively *endorsing* the major party candidates. *Id.* at 494. Accordingly, when AETN bases decisions on whom to include in a debate based on a purported analysis of the pre-existing public support of the candidates, it is not in keeping with the noble purpose underlying public broadcasting, and it retards progress in society.

D. Important Goals of the First Amendment will be Undermined by a Policy that Excludes Unpopular Candidates from Debates.

"Newsworthiness," as a government broadcast standard, flies in the face of the overall goal of the First Amendment of fostering "uninhibited, robust, and wide-open" debates, *New York Times Co. v. Sullivan*, 376, U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686, 701 (1964), so that political and societal changes "may be obtained through lawful means." *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980); *see also Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed.1117 (1931). As this Court stated in *Buckley v. Valeo*, 424 U.S.1, 13, 96 S.Ct. 632 (1976) *citing Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed. 2d 484 (1966) and *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed. 2d 35 (1971):

> [T]here is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates. . . . [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Against this background, AETN and Amici the Association of America's Public Television Stations, the Corporation for Public Broadcasting, *et al.* (hereinafter, "Amicus PBS") have argued that voter education would be lessened if unpopular candidates were allowed to appear in these debates, and that the viewers are best served by having the issues be discussed in depth by those candidates who are receiving "serious support from the public." (Petitioner's Brief, p. 14). Amicus PBS argues that some races had 11, 9 or 7 candidates on the ballot, and opening the door to the third party candidates will result in debates including people like Lar Daly "campaigning in an Uncle Sam costume" and an unhealthy

"cacophony" of voices (Amicus PBS Brief, pp. 14-18).

First, in 1996, there were 487 third party or independent candidates[6] in the 435 Congressional races, which on average, when added to the Republican and Democratic Party candidates, would result in 3.12 candidates in a Congressional debate, *if* all the candidates requested the opportunity to debate. Moreover, while PBS is apparently offended by a candidate donning a costume as part of his challenge to the political *status quo*, many people are equally offended by what one writer called the "Punch and Judy" politicking that passes for political discourse between the major party candidates. Most importantly, the argument that the major party candidates need all the available time in a debate is little more than the kind of argument that prompted this Court to state:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley v. Valeo, 424 U.S. 1, 48-49, 96 S. Ct. 612, 649 (1976).

If there are too many qualified candidates for a debate, the way to address that issue is to hold two debates or for the states to change their ballot access requirements, not for the government to be given the discretion to censor some of those

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[6] Compilation of Amicus Perot '96.

who have qualified. These arguments by Petitioner and Amicus PBS hinge on the idea that a candidate who does not yet have popular support does not have valuable ideas, which is contrary to this country's political history. It also ignores the fact that the "serious support from the public" enjoyed by the Republicans and Democrats is apparently at an all-time low. Americans are increasingly dissatisfied with political debate and "politics as usual," as reflected in low voter turnout,[7] and surveys showing voter discontent.

Amicus the Commission on Presidential Debates ("CPD") argues in its brief that many "legally qualified" candidates whose names may appear on the election ballot have "extremely modest public support" (CPD Brief, p. 5, n. 3), suggesting they do not deserve to be in the debates. But the relative lack of support is in large measure because of the catch-22 faced by such candidates. Unless they have independent wealth and can purchase media coverage, they need media coverage in order to gain popular support. Moreover, while individual candidates, especially at the Congressional level, are not well known enough for the public to indicate in polls that they would vote for a particular

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[7] A November 7, 1996 release of the Committee for the Study of the American Electorate (the"CSAE") shows that despite an estimated 5 million person increase in voter registration, and record amounts of money spent in the 1996 election, voter turnout in 1996 was only an estimated 48.8% of eligible voters, the lowest turnout since 1924 and the second lowest since 1824 (See Appendix). Voter turnout as a percentage of eligible Americans who voted in each year since 1960 (when the modern the presidential debates began) show a declining trend in virtually all years except in 1992 (when voter turnout increased sharply), a year when Ross Perot challenged the major parties and was included in the presidential debates (the only time three candidates appeared in the presidential debates). CSAE statistics of voter turnout from 1924 to 1996, and statistics on the voter turnout in certain foreign democracies, are set forth in the Appendix to this brief.

candidate, in a democracy that abhors censorship, polls of the Gallup Organization and the Pew Research Center for the People and the Press indicate that approximately 60% of the public desires to hear from these candidates.[8]

In arguing that the goal of voter education is best served by hearing in depth at debates from those with popular support (Petitioner's Brief, pp. 9-10), AETN also ignores the fact that in most debates, the time to answer a given question is limited to a minute or two. As a result, an in-depth discussion would more likely occur with three, four or even more candidates supplying a diversity of viewpoints that helps to educate the voter. This is the "widest possible dissemination of information from diverse and antagonistic sources" that this Court has said is necessary for the "bringing about of political and social changes." *Buckley v. Valeo*, 424 U.S. 1, 49, 96 S.Ct. 612, 649 (1976). The argument of Amicus PBS that "a multicandidate debate may well be useful, for example, during primary season" when the candidates may be unknown or the issues "are only beginning to develop" (Amicus PBS Brief, p. 17), reflects a double standard that values the ideas of major party primary candidates, but not third party candidates, ignoring the historical contributions of candidates who are often derogatorily referred to as "fringe candidates." *See* opposition of Petitioner to motion for divided argument by the Federal Communications

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[8] A Gallup poll released July 7, 1995, found that 60% of Americans favor the formation of a third party to run candidates for President, Congress and state office, while 34% were opposed; even 58% of Democrats and 52% of Republicans favored the formation of a third party. *Gallup Newsletter Archives*, Vol. 60, No. 9, July 7, 1995. Another survey of the Pew Research Center for the People and the Press in 1996 found 58% of Americans saying the country should have a third party. *USA Today*, Election '96 Internet report, August 23, 1996.

Commission. Certainly, in the major party presidential primary debates, we have often seen eight or nine candidates participating in debates, including, in the 1996 elections, Republican primary debates that included Alan Keyes, Richard Luger, Robert Dole, Steve Forbes, Pat Buchanan, Phil Gramm, and Lamar Alexander, even though some lacked popular support.[9]

Amicus PBS also suggests that the 8th Circuit decision in *Forbes* will severely limit broadcasters' *coverage* of debates in an effort to persuade the Court that hundreds of political debates sponsored by the public broadcasters will be canceled. But, the 8th Circuit made it clear that its decision in *Forbes*, under the court's public forum analysis, did not grant the candidate unlimited access to public television. The forum in question was simply the particular debate that was sponsored, not any general right to appear on the station, or to be in debates sponsored by private parties and *covered* by AETN. *Forbes v. Arkansas Education Television Commission*, 93 F.3d 497, 503 (8th Cir., 1996).

In *U.S. Term Limits, Inc. v. Thornton, et al.*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.ed. 2d 881 (1995), the Court expressed its concern that government-imposed standards would lead Congress to become a self-perpetuating body. In

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[9] In 1996, among other reforms, the NLP, Reform and Green parties strongly advocated public financing of political campaigns; the NLP urged that proven preventive health measures be permitted to be paid by Medicare and Medicaid, a low flat tax, a moratorium on the commercialization of genetically engineered foods, or at least labeling such foods (as is now being mandated by the European Union) to give consumers a choice; and the use of proven stress reduction strategies for rehabilitating inmates as an antidote to their chronic anger and violence; and the NLP and Green Party candidates advocated taxing polluting industries to reflect their real cost to society, and "green" payments to promote sustainable agriculture.

the same way, allowing the government to decide who may debate leads to self-perpetuation of government and the erosion of the "fundamental principle of our representative democracy" that "the people should choose whom they please to govern them." *U.S. Term Limits, Inc,*. 514 U.S. 779, 115 S.Ct. 1842, 1845, 131 L.Ed. 2d 881 (1995), *citing Powell v. McCormack*, 395 U.S. 486, 547, 89 S.Ct. 1944, 1977, 23 L.Ed. 2d. 491 (1969).

E. The newsworthiness standard is impermissibly subjective.

In looking at Professor Mack's formulation of newsworthiness in *Marcus v. Iowa Public Television*, 93 F.3d 1137, 1143-1144 (8th Cir. 1996), as well as the formulation of Dan Miller, the Iowa Public Television executive in that case who excluded seven third party candidates from debates in *Marcus*, it is clear that the evaluations are highly subjective.[10]

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[10] The district court in *Marcus* at 93 F.3d 1143 quoted Mr. Miller's definition of newsworthiness, as follows: "As it applies to this matter, newsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in all of Iowa's 99 counties or in a majority of them? Does it have—my phrase, not a good one—an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are seeking it to bring ideas into the marketplace? How has their fund-raising been? Is it a broad base? Do they have a lot? Do they have little? Whatever. How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other new organizations? What are we hearing? What are we hearing either from the public or what are we hearing from the campaigns themselves? Are people calling us and saying

Marcus at 93 F. 3d 1143. Although not mentioned by the 8th Circuit in *Marcus*, in its quotation of Mr. Miller's testimony, immediately after listing 27 factors to be considered in determining "newsworthiness," Miller said that they were only "some of the things that go into making a very subjective judgment."[11] Mr. Miller's definition illustrates the problems caused by the use of highly subjective criteria. The person attempting to comply with Miller's criteria, for example, cannot know which of the 27 criteria are most important or whether they must all be complied with.

Among his many factors, Miller asks how the fund-raising has been ("Do they have a lot [of money]?"). First, how much money do you have to have to get into a debate, especially when in *Buckley v. Valeo*, 424 U.S. 1, 49, N.5, 96 S.Ct. 612, 649 (1976), the Court suggested wealth may not be "germane" in politics. The *Buckley* opinion discussed cases invalidating government-imposed wealth restrictions on the right to vote or file as a candidate for public office and said

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you know, "Such and such had a crowd of 550 last night," or are they calling us and saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves? Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper ads? Are they buying radio ads? Did they in their last campaign buy newspaper or radio ads?"

[11] Appellant's Reply Brief on appeal to the 8th Circuit Court of Appeals in *Marcus v. Iowa Public Television*, February 27, 1997 at http://www.lisco.com/~crimevaccine/appelbrief.htm (Section I(e)(4)(b) of the Brief).

wealth was not "germane to the ability to participate intelligently in the electoral process." Success in fund raising or popularity is also not germane to the issue of whether a candidate should have the right to participate in debates, and the public a right to hear his views.

Placing broad discretion in the hands of government employees to regulate who gets to speak (i.e., allowing government employees to utilize unclear, subjective standards), has long been condemned by the courts because of the potential for arbitrary action and censorship. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95, S. Ct. 1239, 1244, 43 L. Ed.2d 448, 456 (1974), this Court stated:

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority [to restrict the use of a government forum] was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.

II. There is no compelling state interest which permits AETN to select candidates for debates based on editorial discretion and a subjective determination of who is "newsworthy."

AETN argues it has two compelling state interests: allowing its employees to exercise "editorial judgment" and "operat[ing] the network in conformity with the FCC's licensing requirements" (Petitioner's Brief, p. 37). These are

both based on the alleged need for AETN to exercise discretion in selecting candidates for debates.

First, in the context of a federal election, there cannot be a compelling state interest that permits *subjective*, editorial decisions in selecting candidates for a debate when federal regulations require *objective* criteria. Regulations promulgated pursuant to the Federal Election Campaign Act require all broadcasters, public and private, when selecting participants for debates among candidates for federal offices, to use *pre-established objective criteria*. 11 CFR § 110.13(c). The commentary in the *Federal Register* makes it clear that this is a mandatory requirement, since the purpose of 11 CFR §110.13 is to provide a specific exception so that the news media may stage debates "without being deemed to have made prohibited corporate contributions to the candidates taking part in the debates." 60 Fed. Reg. 64,261 (1995). The public policy and governmental interest in utilizing pre-established objective criteria is "to avoid the real or apparent potential for a *quid pro quo* and to ensure the integrity and fairness of the process." *Id.* at 64,262. The commentary in the *Federal Register* also states that:

> [T]hose staging debates would be well advised to reduce their *objective* criteria to writing and to make the criteria available to all candidates *before* the debate. This will enable staging organizations to show how they decided which candidates to invite to the debate.

Id. (emphasis added).

Thus, even if AETN had a compelling interest in "maintaining editorial control" over *news programming* generally in order to satisfy the FCC and the Communications Act, there is no government interest in subjectively or

discretionarily excluding legally qualified candidates from a government-sponsored *federal election debate*.

Petitioner also argues that its exclusion of Mr. Forbes is compelled by the Federal Communications Act ("FCA"). (Petitioner's Brief at pp. 37-38). However, Congress lacks the power to authorize the State of Arkansas to exclude from the debates candidates it otherwise could not exclude under the First Amendment simply by passing the FCA and having the FCC issue licensing regulations. If Congress could so manufacture compelling state interests for the states via ordinary legislation, the states' conduct would be subject not to the rule of the Constitution, but rather to the prevailing political attitudes of Congress. In addition, even under the FCA, a broadcast licensee has numerous obligations limiting its control over programming. A licensee must regulate its programming "in light of the tastes and ascertained needs and problems of the community," *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978), and safeguarding the rights of minority party candidates is an extremely important need of any community. *Greenberg v. Bolger*, 497 F.Supp. 756, 768-72 (E.D.N.Y. 1980). Moreover, "[i]n the conflict of interests. . . between broadcasters . . . and the public . . . the Communications Act makes the interest of the public paramount." *Writer's Guild of America v. American Broadcasting*, 609 F.2d 355, 362 (9th Cir. 1979). The Communications Act and its predecessors were themselves written to cause "regulators and the licensees to walk a 'tightrope' to preserve the First Amendment values. . . ." *Id.* at 363. Broadcasting licenses are to be reviewed based on what is in the public interest, not based on the "official government view dominating public broadcasting." *Red Lion Broadcasting Co v. FCC*, 395 U.S. 367, 396, 89 S.Ct. 1794, 1810 (1969). In view of this history, constitutional compliance should not threaten any supposed

state interest in complying with the Communications Act or jeopardize any broadcasting licenses.

AETN urges that Forbes' rights are sufficiently protected under the reasonable access doctrine pursuant to the FCA, which allows *all* candidates for federal office some access to public television (albeit it may only be a few minutes). But providing a public broadcasting station with a "talking head" commercial, a right that all candidates have, is no substitute for the opportunity to debate the other candidates.[12] In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556, 95 S.Ct. 1239, 1245, 43 L.Ed. 2d 448, 456 the Supreme Court stated:

> Whether Petitioner might have used some other, privately owned, theater in the City for the production is of no consequence. . . . Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. "[O]ne is not to have the exercise of his liberty of expression in an appropriate place abridged on the plea that it may be exercised in some other place" [quoting *Schneider v. State*, 308 U.S. 147 at 163].

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[12] Judge Clark pointed out in *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 493 (11th Cir. 1990) (Clark, J. dissenting)

> there is only one way for candidates themselves to argue their positions with each other: through the medium of a debate. . . [which] serves to inform the public far more effectively than any candidates' lone appearance could by creating a synergism between the candidates' immediately conflicting positions.

III. Any compelling interest, even if one existed, must be unrelated to the suppression of speech.

Compelling state interests that can justify the exclusion of would be speakers from a public forum are illustrated in *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed.2d 155 (1939). Such compelling state interests must be unrelated to the suppression of speech. See e.g., *Procunier v. Martinez*, 416 U.S. 396, 414 94 S.Ct. 1800, 1811, 40 L.Ed. 2d 224 (1974); *United States V. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968). In *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Court analyzed *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), and explained that the discretionary licensing requirement there involved was not tailored to "a substantive evil unrelated to the suppression of ideas," and that "any enforcement carries with it the risk that the enforcement is being used merely to suppress speech, since the statute is not aimed at a substantive evil within the power of the government to prohibit." 466 U.S. at 795, n. 14. Similarly, in this case there is no substantive evil to be prohibited, and the discretion sought by AETN carries with it the risk of arbitrary action and the risk that the discretion will be used to suppress speech. Here, of course, AETN's asserted interest is the right to pick and choose which candidates will be permitted to speak in its debates — in other words, the right to edit. Obviously, the power to edit includes and consists primarily of, the right to suppress expression. As stated by the Court, in speaking of *commercial* broadcasters, "for better or worse, editing is what editors are for; and editing is selection and choice of material." *Columbia Broadcasting System v. Democratic National Comm.*, 412 U.S. 94, 124-25 (1973). While the private broadcaster can freely edit, government broadcasters must be in a different

category when it comes to the selection of candidates for a political debate.

Here, the basic state interest being asserted is an interest in *not* broadcasting speech which government employees deem unworthy of being in the debate. Thus, the asserted state interest is not only ***related*** to the suppression of speech, it *is* the suppression of speech, and is unconstitutional.

IV. The means adopted by AETN to achieve its alleged compelling state interests are inappropriate and not narrowly tailored.

The *Statement of Principles of Editorial Integrity* are recitations of broad principles, not narrow standards. If they are held to be narrowly tailored, virtually any writings that can be found in the government's files would serve to provide narrowly tailored standards. In fact, the *Statement of Principles* expressly requires AETN to provide "alternative programming" and a "wide range of programming" to serve the community needs, *not* to follow exclusionary policies. Moreover, nowhere is the standard AETN says it applied—"newsworthiness"—mentioned in the *Statement of Principles* or, to the knowledge of this amicus, any other AETN document in evidence. If newsworthiness were a clear and important standard for public broadcasting decisions, especially those dealing with political debates, surely it would be contained in some written document that AETN could point to. The basic interest asserted by AETN is an interest in allowing it to have discretion to make "journalistic decisions." But discretion is discretion and is the opposite of narrow tailoring.

V. The Government Employees at AETN are Not Independent Journalists but State Actors, and Their

Exclusionary Decisions Need to be Scrutinized by the Judiciary.

AETN argues that its judgments about newsworthiness are protected by the First Amendment, and the executive director's *editorial* decisions are "a private press function," and the press is an "adversary to the state." (Petitioner's Brief, pp. 42-44). This is a novel argument.

AETN never suggests that Ms. Howarth, its executive director, is other then a full-time government employee. She is paid by the State, and unlike federal judges, who are appointed for life, and thereby gain independence from the government, public broadcasting journalists enjoy no such position and cannot blindly be trusted to function "independently" of their government employer. Moreover, the State of Arkansas owns the television network. The 8th Circuit in *Forbes* concluded that AETN was a "governmentally owned and controlled television station." *Forbes* at 93 F.3d 500.

Certainly, if the federal government started to acquire controlling interests in privately owned broadcasting stations, there would be an uproar in this country due to First Amendment concerns that the government was trying to impose its view on the public. And no assurances that the government would not allow partisan politics to influence programming would be accepted because of the subtle (and not so subtle) ways in which money buys control. AETN, owned and controlled by the government, can hardly claim to be anything other than a state actor, and a court's limited involvement in ensuring that a public broadcaster complies with the First Amendment is warranted where political speech is concerned. History tells us that the First Amendment grew out of the tyranny of England over the colonies, when the

British government practiced censorship to prevent criticism of its rule. The threat to be feared is *government censorship*, which means silencing voices. This case simply involves a request for *additional voices* to be heard in a public forum, which is the opposite of censorship, and which poses *no* threat to a democracy.

Finally, while the private press sometimes acts as a watchdog with respect to the government, at other times the symbiotic relationship of the press with politicians (the press needs the politicians for their stories, and the politicians need the press for public exposure) results in less than watchdog independence. But even if the private press is *sometimes* in an adversarial relationship with government, in weighing First Amendment issues, it can *never* be assumed that government journalists are in an adversarial relationship with their employers.

CONCLUSION

For the foregoing reasons, Amicus NLP urges the Court to affirm the decision of the Eighth Circuit in *Forbes*.

Respectfully submitted,

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APPENDIX

A-1

Appendix

Committee for the Study of the American Electorate[1]

Statistics Released November 7, 1996

This table presents the number and percentage of eligible Americans (Voting Age Population or VAP) who voted for President in each year.

Year	VAP	Percent of VAP Voting
1996	196,507,000	48.8
1992	189,044,000	55.2
1988	182,628,000	50.1
1984	174,467,000	53.1
1980	164,595,000	52.6
1976	152,308,000	53.5
1972	140,777,000	55.2
1968	120,285,000	60.9
1964	114,090,000	61.0
1960	109,672,000	62.8
1956	104,515,000	59.4
1952	99,929,000	61.6
1948	95,575,000	51.1
1944	85,654,000	56.1
1940	84,728,000	58.8
1936	80,354,000	56.8
1932	75,768,000	52.6
1928	71,185,000	51.8
1924[2]	66,414,000	43.8
1924[2]	59,503,466	48.9

[1] These statistics are compiled by the Committee for the Study of the American Electorate, 421 New Jersey Ave., S.E., Washington, D.C. 20003.

[2] The Census Bureau's estimate of 1924 Voting Age Population includes an unusually high number of unnaturalized residents who could not vote. For this reason, the second set of figures for 1924 turnout, is based on an alien-adjusted estimate of VAP, to provide a more accurate comparison.

International Foundation for Election Systems[1] Voter Turnout in Foreign Countries as a Percent of Voting Age Population (VAP)

Country	Date of Most Recent Election[2]	VAP	Percent of VAP Voting
Austria	Dec. 17, 1995	6,269,000	76.1%
Canada	Oct. 25, 1993	22,165,000	61.2%
Denmark	Sept. 24, 1994	4,101,000	81.9%
Finland	March 19, 1995	3,935,000	70.6%
France	April 23, 1995	44,299,000	70.8%
Germany	Oct. 16, 1994	65,770,000	72.6%
Ireland	Nov. 25, 1992	2,481,000	70.6%
Sweden	Sept. 18, 1994	6,811,000	82.8%
United Kingdom	April 9, 1992	44,761,000	74.4%

[1] These statistics are compiled by the International Foundation for Election Systems, a non-profit educational organization with headquarters at 1101 15th Street, N.W., Third Floor, Washington, D.C. 20005.

[2] All elections are parliamentary elections other than France, which was a presidential election, and Germany, which was a legislative election. None of these countries have compulsory voting.

No. 96-779

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION, PETITIONER

v.

RALPH P. FORBES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, when providing news-related programming to the communities they serve, broadcast stations licensed to state and local governmental entities are subject to First Amendment limitations inapplicable to private commercial broadcasters.

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BRIEF FOR THE
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INTEREST OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES

The Federal Communications Commission (FCC) is the agency to which Congress has delegated the authority to regulate the broadcasting industry under the Communications Act of 1934. See 47 U.S.C. 151 *et seq.* Congress and the FCC have committed substantial public resources—in the form of frequency allocations and federal funds—to the development of noncommercial educational broadcasting (commonly referred to as "public broadcasting"). In so doing, Congress and the FCC have acted on the

premise that the employees of all public broadcasting stations, of which more than two-thirds are licensed to state entities, will exercise the same editorial discretion over the content of their programming as their counterparts in private commercial broadcasting. In holding that the First Amendment constrains the editorial decisions of a state-entity licensee, however, the court of appeals' decision in this case threatens the premise underlying the federal regulatory scheme. The Commission and the United States therefore have a substantial interest in the outcome of this case.

STATEMENT

1. a. Before passage of the Radio Act of 1927, ch. 169, 44 Stat. 1162, "the allocation of [broadcasting] frequencies was left entirely to the private sector, and the result was chaos." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 375 (1969). Congress recognized that, unless the federal government regulated access to the airwaves, each speaker would be drowned out in a "cacophony of competing voices." *Id.* at 376. Congress thus enacted the Communications Act of 1934, ch. 652, 48 Stat. 1064, "to protect the public interest in communications," *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942), by formulating "a unified and comprehensive regulatory system for the industry." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Congress assigned enforcement responsibility under this new regulatory scheme to the FCC.

Broadcasters are granted station licenses for terms of up to eight years. Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, § 203, 110 Stat. 112 (to be codified at 47 U.S.C. 307(c)(1) (Supp. II 1996)). The Commission may grant and subsequently renew such licenses only after finding that doing so will serve "the public convenience, interest, or necessity." 47 U.S.C. 303, 307(a); see 1996 Act §§ 203, 204(a)(1), 110 Stat. 112-113 (to be codified at 47 U.S.C. 307(c)(1), 309(k) (Supp. II 1996)). The "policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license." *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

A central element of this regulatory scheme is the responsibility of the individual licensee, whether a governmental or private entity, to act as a public trustee. A broadcasting license is a public trust. The licensee obtains "the free and exclusive use of a limited and valuable part of the public domain" and, in return, assumes a duty to serve the public interest. See *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 997, 1003 (D.C. Cir. 1966). As one sponsor of a predecessor to the Communications Act observed 70 years ago, "the right of the public to service is superior to the right of any individual. * * * If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479 (1926) (remarks of Rep. White); see also S. Rep. No. 562, 86th Cong., 1st Sess. 8 (1959) (amendments to Communications Act); *Red Lion*, 395 U.S. at 375-377; *Office of Communication of United Church of Christ* v. *FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969).

The "ability of the licensee to render the best practicable service to [its] community" is crucial to the Commission's licensing decisions. *Sanders Bros.*, 309 U.S. at 475. Specifically, a broadcaster must

direct issue-responsive programming to the identified needs of its community. See *Commercial TV Stations*, 98 F.C.C.2d 1076 (1984), reconsideration denied, 104 F.C.C.2d 358 (1986), aff'd in relevant part *sub nom. Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968, reconsideration granted in part, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication of United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Failure to meet that requirement can lead to the denial of a broadcaster's renewal application. See *Alabama Educ. Television Comm'n*, 50 F.C.C.2d 461 (1975).

Each licensee must itself undertake, and therefore may not delegate, the "primary duty and privilege to select the material to be broadcast to his audience." *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2311-2312 (1960); see also *Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594, 599-600 (D.C. Cir.), cert. denied, 414 U.S. 914 (1973). The FCC "has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee," *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967), and has expressed strong disapproval of any decision by a licensee to relinquish control over portions of its programming. See, *e.g.*, *Trustees of Univ. of Pennsylvania*, 69 F.C.C.2d 1394 (1978); *Cosmopolitan Broadcasting Corp.*, 59 F.C.C.2d 558, reconsideration denied, 61 F.C.C.2d 257 (1976), rev'd on other grounds, 581 F.2d 917 (D.C. Cir. 1978); *Carol Music, Inc.*, 37 F.C.C. 379, 380, 400 (1964); see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier") (to be recodified at 47 U.S.C. 153(10) (Supp. II 1996)).

b. A broadcaster must exercise the same editorial control over its political programming that it exer-

cises over all other forms of programming. The Communications Act draws an important distinction, however, between political programming and political advertisements, over which candidates, rather than broadcasters, exercise absolute editorial control. See generally *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959). The Act imposes a specific set of requirements on a broadcaster's sale (or contribution) of airtime to candidates for political advertising. Section 312(a)(7) gives all legally qualified federal candidates a limited right of "reasonable" access to the airwaves, and Section 315(a) provides that, if any legally qualified candidate for public office "use[s]" a broadcast station (by, for example, purchasing airtime for political advertisements), other candidates for the same office must be given an "equal opportunit[y]" to use that station as well. See 47 U.S.C. 312(a)(7), 315(a); see generally *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981); *Kennedy for President Comm.* v. *FCC*, 636 F.2d 417, 422-424 (D.C. Cir. 1980); *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd 678, 680-686 (1991), reconsideration granted in part, 7 F.C.C. Rcd 4611 (1992).

A candidate's appearance in a broadcaster's news programming, however, is not a "use" by that candidate of the broadcaster's station. 47 U.S.C. 315(a). It is instead an intrinsic part of any broadcaster's journalistic efforts to inform the public about political developments. Accordingly, the Communications Act exempts news programming, including such "bona fide news events" as televised candidate debates, from any "equal opportunities" requirement that would grant rights of appearance or participation to excluded candidates. See 47 U.S.C. 315(a)(1)-(4); *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), cert.

denied, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), aff'd *sub nom. League of Women Voters Educ. Fund* v. *FCC*, 731 F.2d 995 (D.C. Cir. 1984) (Table); see also *American Independent Party*, 62 F.C.C.2d 4, aff'd mem. *sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir. Oct. 21, 1976), cert. denied, 430 U.S. 955 (1977).

Moreover, a televised candidate debate is a "bona fide news event," and qualifies for the exemption from the equal-opportunities requirement, even if the debate is sponsored by the broadcaster itself. See *Henry Geller*, *supra*; see also *King Broadcasting Co.* v. *FCC*, 860 F.2d 465, 466-467 (D.C. Cir. 1988); *Fox Broadcasting Co.*, 11 F.C.C. Rcd 11,101 (1996). The Commission has indicated, however, that it will recognize that exemption only where a broadcaster's decision to exclude a candidate from a debate it has sponsored rests on a reasonably based, good-faith journalistic judgment about the most effective way to present the debate to the public, and not on a desire to promote or suppress the views of a particular candidate. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd at 684, 685 n.51; *Cyril E. Sagan*, 1 F.C.C. Rcd 10 (1986); *Brown for President Comm.*, 75 F.C.C.2d 609, 613-614 (1980); see also *Chisholm*, 538 F.2d at 358-360.

c. "The history of noncommercial, educational broadcasting in the United States is as old as broadcasting itself." *FCC* v. *League of Women Voters*, 468 U.S. 364, 367 (1984); see also S.E. Frost, Jr., *Education's Own Stations* 464 (1937). Between 1921 and 1936, the federal government issued approximately 200 radio broadcast licenses to educational institutions, many of which were public. See *id.* at 2-5. When the FCC first reserved frequencies for

noncommercial educational (or "public") television use, it fully expected that many public broadcasting facilities would be licensed to, and financed by, state and local governmental entities. See *Television Assignments, Sixth Report and Order*, 41 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock).[1] Approximately two-thirds of public broadcasting stations are now licensed to governmental entities. See *League of Women Voters*, 468 U.S. at 393 n.22.[2]

With few exceptions, public broadcasters are subject to the same regulatory standards as commercial broadcasters, including the requirement that each licensee retain editorial control over the content of its

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[1] Since 1962, the federal government has provided substantial public funding for noncommercial educational broadcasting. See Educational Television Act of 1962, Pub. L. No. 87-447, 76 Stat. 64; Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365; see also *Accuracy in Media, Inc.* v. *FCC*, 521 F.2d 288, 292 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Muir* v. *Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1040 (5th Cir. 1982) (en banc), cert. denied, 460 U.S. 1023 (1983).

[2] Today, noncommercial educational stations in general (including those licensed to private entities) account for 365 of the 1,555 television broadcast licenses in the United States; among the nation's 12,142 total radio stations, 1,871 are classified as noncommercial educational stations. See Federal Communications Comm'n, Mass Media Bureau; *Broadcast Station Totals* (May 9, 1997). Although governmental entities typically seek licenses to operate noncommercial educational stations, they may, and occasionally do, operate commercial stations as well. See, *e.g.*, *Iowa State Univ. Broadcasting Corp.*, 9 F.C.C. Rcd 481 (1993), aff'd *sub nom. Iowans for WOI-TV, Inc.* v. *FCC*, No. 94-1014, 1995 WL 116251 (D.C. Cir. Feb. 24, 1995) (50 F.3d 1096 (Table)); George N. Gordon, *Educational Television* 9 (1965).

programming.[3] In particular, the FCC has addressed, and has specifically rejected, the position that the editorial decisions of state-entity broadcast licensees are subject to greater legal constraints than the decisions of any other licensee. The Commission reasons that, because there is no constitutional right of access to a broadcast station, and because Congress refused to treat broadcasters as common carriers, state-entity licensees have both the same "public trustee" responsibilities and the same editorial discretion as private licensees. Accordingly, the Commission has concluded that the "public forum doctrine" is not applicable to, and the First Amendment does not restrict, a state-entity licensee's choice and selection of programming. See *Mississippi Auth. for Educ. Television*, 71 F.C.C.2d 1296, 1303 n.12 (1979); *City of New York Municipal Broadcasting Sys.*, 56 F.C.C.2d 169, 170 (1975).

2. This case concerns the constitutionality of a decision by the Arkansas Educational Television Network (AETN) to sponsor and broadcast a 1992 debate

[3] See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 650-651 (1994); *League of Women Voters*, 468 U.S. at 367; *Muir*, 688 F.2d at 1040; *Accuracy in Media*, 521 F.2d at 291. The exceptions are a ban on supporting or opposing any candidate for office; a requirement that such broadcasters operate on a noncommercial, nonprofit basis; and a general prohibition against accepting payment for the broadcast of commercial or political advertisements. See 47 U.S.C. 399, 399b; 47 C.F.R. 73.621. Like all other licensees, however, public broadcasters are subject to the "reasonable access" and "equal opportunities" requirements of Sections 312(a)(7) and 315(a) of the Communications Act. See, *e.g.*, *Codification of Commission's Political Programming Policies*, 7 F.C.C. Rcd at 681; *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079, 1092-1094 (1978).

between the two leading candidates for a seat in the United States House of Representatives. Petitioner Arkansas Educational Television Commission (AETC), an Arkansas state agency, operates AETN.[4] Petitioner did not invite respondent Ralph P. Forbes, an independent candidate for the congressional seat at issue, to participate in the debate. That decision rested not on any disagreement with respondent's political viewpoint, but on his lack of public support, the absence of public interest in his candidacy, and his negligible chance of electoral success. See Pet. 2-3, 6, 14-15; Pet. App. 8a-9a.

Although candidates seeking airtime on any broadcast station may pursue various administrative remedies under Sections 312(a)(7) and 315(a) of the Communications Act by filing a complaint with the FCC, see pp. 5-6, *supra*, respondent filed no such complaint and instead sought relief directly in federal district court, asserting, among other things, a First Amendment right to participate in the debate. The district court dismissed the suit for failure to state a legally valid claim, and respondent unsuccessfully sought preliminary injunctive relief in the court of appeals. See Pet. App. 43a-44a.

Sitting en banc to hear respondent's appeal on the merits, however, the Eighth Circuit remanded the case to the district court for further proceedings. Pet. App. 25a-42a (*Forbes I*). It held that AETN is a state actor, that it "is faced with constraints not shared by other television stations," that respondent had "a qualified right of access created by [petitioner's] sponsorship of a debate," and that petitioner

[4] We will refer to AETC and AETN collectively as "petitioner."

"must have a legitimate reason to exclude him strong enough to survive First Amendment scrutiny." *Id.* at 33a-34a. The court suggested that whether or not petitioner's "reason" was "strong enough" turned on whether the debate should be characterized as a "nonpublic" or, alternatively, as a "limited public" forum, an issue that the court remanded to the district court. *Id.* at 34a-37a. This Court denied certiorari. 513 U.S. 995 (1994).

On remand, the district court found as a matter of law that the debate was a nonpublic forum. See Pet. App. 6a. The court also submitted to the jury special interrogatories asking whether the decision to exclude respondent from the debate was influenced by political pressure or disagreement with respondent's views. The jury answered those questions in the negative. See *id.* at 7a-9a. Based on those findings, the district court ruled for petitioner.

The court of appeals reversed. Pet. App. 1a-18a (*Forbes II*). The court accepted the jury's determination that the decision to exclude respondent from the debate was viewpoint-neutral and free of influence from political pressure. See *id.* at 7a-9a. Indeed, it specifically found that the decision to exclude petitioner "was made in good faith" and was "exactly the kind of journalistic judgment routinely made by newspeople." *Id.* at 16a. Nonetheless, although the court acknowledged (*id.* at 15a) that petitioner had never intended to open the debate to all legally qualified candidates, it held that the debate was a "limited public forum" and that petitioner was without authority to exclude peripheral candidates: "Whether [respondent] was viable was, ultimately, a judgment to be made by the people of the Third Congressional District, not by officials of the government

in charge of channels of communication." *Id.* at 16a.[5] Finding that petitioner's reason for excluding respondent from the debate was "neither compelling nor narrowly tailored"—the standard of review that the court deemed applicable to speech restrictions in limited public forums—the court reversed and remanded for an assessment of damages. *Id.* at 17a-18a.

On September 25, 1996, Justice Thomas denied petitioner's application to stay enforcement of the Eighth Circuit's decision pending the filing of a petition for certiorari. See Pet. 8. On September 26, 1996, the Eighth Circuit, in denying petitioner's motion to stay its mandate, issued a one-paragraph clarification of its earlier decision. Pet. App. 19a. The court stated that petitioner remains free, "to the extent provided by law," to cover "bona fide news events," including candidate debates, that are "organized by people or groups other than [petitioner]." *Ibid.* The court added that its earlier decision did not necessarily require petitioner to invite write-in candidates to participate in any debate that it sponsored. *Ibid.*

SUMMARY OF ARGUMENT

In sponsoring a televised candidate debate, any broadcaster, whether public or private, makes numerous, interrelated editorial judgments concerning the debate's format, content, purpose, and participants. The product of those judgments is an expressive news program designed to satisfy the broadcaster's statu-

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[5] In so holding, the court noted (Pet. App. 37a n.4) that its decision conflicted with a decision reached by the Eleventh Circuit on essentially indistinguishable facts. See *Chandler* v. *Georgia Pub. Telecommunications Comm'n*, 917 F.2d 486 (1990), cert. denied, 502 U.S. 816 (1991); see also *Muir*, *supra*.

tory duty to exercise its own journalistic discretion to inform its viewers on matters of public interest. Sponsorship by a state actor does not convert that news program into a "public forum" to which private individuals have a constitutional right of access. Instead, televised debates and other news programs sponsored by state-entity broadcasters, like academic lecture series sponsored by state universities, are informative, focused presentations that, as a general matter, a state actor may constitutionally create, structure, and invest with such content as it deems appropriate. See generally *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2519 (1995); *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981).

Indeed, subjecting the editorial discretion of state-entity broadcasters to case-by-case constitutional scrutiny would disserve "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 392 (1969). Compelling state-entity broadcasters to invite every legally qualified candidate to any debate that they sponsor, or even exposing those broadcasters to a threat of constitutional litigation for excluding particular candidates, could discourage many such broadcasters from sponsoring political debates at all. Moreover, there is no obvious limiting principle that would afford minor candidates a constitutional "right of access" to televised debates but not, for example, to evening news broadcasts featuring interviews with the major candidates. Indeed, carried to its logical conclusion, the court of appeals' reasoning—that "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a)—could bar state-entity broadcasters from structuring weekly panel

discussions to include certain outside commentators but not others who might also wish to participate.

Because broadcast journalism often requires difficult judgments about the range of differing viewpoints that can be feasibly and usefully presented on any given topic, application of "forum" analysis to the editorial decisions of state-entity broadcasters could imperil the ability of those broadcasters to air many kinds of news programming. Nonetheless, even if that analysis were applicable, which it is not, and even if (as the court of appeals believed) the debate at issue here could properly be characterized as a limited public forum, petitioner's decision to exclude respondent would be constitutional. Petitioner's decision to exclude non-major candidates from the debate was both viewpoint-neutral and reasonably calculated to preserve the character of the debate as an efficient means for community viewers to learn the positions of the principal candidates. That showing is enough to justify regulation of speech in either a limited public forum or a nonpublic forum. See *Rosenberger*, 115 S. Ct. at 2517.

ARGUMENT

The court of appeals held that a state-entity public broadcaster, when sponsoring a political debate for the benefit of the viewers in its community, may not limit the participants to the principal candidates, but must also invite every "legally qualified" candidate—no matter how peripheral—for the elective office at issue. That decision was incorrect and should be reversed.

I. THE FIRST AMENDMENT DOES NOT CONSTRAIN THE EDITORIAL CHOICES OF STATE-ENTITY PUBLIC BROADCASTERS LICENSED TO OPERATE UNDER THE COMMUNICATIONS ACT

a. "Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1973). Instead, Congress relied on the diverse editorial decisions of individual broadcasters, combined with each broadcaster's statutory duty to serve the needs of its viewing community, to ensure a rich marketplace of ideas in television broadcasting. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 378 (1984). "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values." *CBS, Inc.*, 412 U.S. at 124-125.

That judgment is no less applicable to state-entity broadcasters than to any other broadcaster. See *League of Women Voters*, 468 U.S. at 392 n.21, 397-399; see also *CBS, Inc.*, 412 U.S. at 121-132 ("assuming [that] governmental action" inheres in the actions of commercial broadcasters in their role as public trustees, an issue on which the Court reached no majority, the First Amendment nonetheless creates no "right-of-access" to broadcast stations for purchase of editorial advertising). The Communications Act and the FCC's detailed regulatory scheme require every broadcaster, whether public or private, to

use its own editorial discretion to serve the public interest, and no broadcaster may cede that responsibility to members of the general public. See pp. 4-5, *supra*; *CBS, Inc.*, 412 U.S. at 108-114; see also 47 U.S.C. 153(h) (no broadcaster shall "be deemed a common carrier") (to be recodified at 47 U.S.C. 153(10) (Supp. II 1996)); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

A state-entity broadcaster's responsibility to exercise editorial control and judgment over the content of its programming is therefore inconsistent with any characterization of those broadcasters, or of the programs each such broadcaster airs, as "public forums." A structured debate between the two major candidates for a given political office, sponsored and aired by a state-entity licensee, is a news program designed to meet the viewing needs of the licensee's broadcast community. See pp. 5-6, *supra*. A news program is more likely to meet those needs if, as Congress intended, the sponsoring broadcaster may exercise its journalistic discretion to exclude material that would detract from the program's overall effectiveness. Such programs are not, and should not be equated with, government property opened up for untrammeled expression by a broad variety of individual speakers, cf. *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), and they therefore do not create a right of access to every peripheral candidate who wishes to appear on television.

b. The court of appeals erred not simply in characterizing a state-entity licensee's news programming

as a "limited public forum," but also, more fundamentally, in employing "forum" analysis at all to resolve this case. As discussed in point II below, this Court has relied upon that analysis to determine the proper level of First Amendment scrutiny applicable to restrictions on private speech that, while delivered on (or by means of) public property, is not itself part of a state actor's own expressive presentation to the public. See generally *Rosenberger*, 115 S. Ct. at 2518-2519; *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). In that context, even when the public property at issue is characterized as a "nonpublic" forum, a speech regulation may be subject to significant First Amendment constraints (such as a viewpoint-neutrality requirement). See, *e.g.*, *Perry Educ. Ass'n*, 460 U.S. at 46.

But "forum" analysis is altogether inapplicable where, as here, a state actor[6] creates, and exercises

[6] Petitioner "is an agency of the State of Arkansas," Pet. 2, and is therefore "part of the Government for purposes of the First Amendment." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995); cf. *West* v. *Atkins*, 487 U.S. 42, 50-51 (1988); *Polk County* v. *Dodson*, 454 U.S. 312, 320-322 (1981). Nonetheless, federal law insulates the editorial decisions of state-entity broadcasters from political influence by the federal government, see *League of Women Voters*, 468 U.S. at 389-390, 394, and the Communications Act imposes on such broadcasters the same obligation to serve the public interest as it imposes on other licensees. Moreover, petitioner's organizational structure and operating principles serve to protect its editorial decisions from influence by state or local government officials. See J.A. 110-112, 195-197; see also Pet. App. 7a-8a (accepting jury's finding that the decision to exclude respondent from the debate was not "influenced in any way by political pressure from anyone inside or outside of the Arkansas Educational Television Network"). Although such influence on a broadcaster (whether or not it is a state entity) might impair the broadcaster's performance of its statutory obligations under the Communications Act, it would not, in our view, change the analysis under the First Amendment.

continuing editorial control over, a structured news or educational program designed to edify the public on discrete topics. Cf. *Rosenberger*, 115 S. Ct. at 2519. In that setting, among others, the state actor may take the same reasonable measures a private party might pursue in analogous circumstances to ensure that its program is "neither garbled nor distorted." *Ibid.*; cf. *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992) (distinguishing, for First Amendment purposes, between government "as lawmaker" and government "as a proprietor"); *United States* v. *Kokinda*, 497 U.S. 720, 725-726 (1990) (plurality opinion) (similar); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303-304 (1974) (plurality opinion) (similar).

That conclusion follows from the more general principle that, "when the State is the speaker, it may make content-based choices." *Rosenberger*, 115 S. Ct. at 2518 (citing, *inter alia*, *Widmar*, 454 U.S. at 276, and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)); see also *id.* at 2548 n.11 (Souter, J., dissenting). Of course, a televised candidate debate contains much speech that is not itself the speech of the sponsoring broadcaster and cannot be attributed to the broadcaster: during the course of the debate, the candidates give their own answers to the questions they are asked. Nonetheless, the program itself—much like televised weekly panel discussions featuring the views of designated outside commentators—is the expressive product of a

series of interrelated journalistic judgments by the broadcaster about format, purpose, the topics to be addressed, and the participants to be invited. Those judgments, and the news programs that they shape, are no more subject to First Amendment challenge than would be the direct expression of a government spokesperson's views on a matter of public importance. See generally *Block* v. *Meese*, 793 F.2d 1303, 1312-1314 (D.C. Cir.), cert. denied, 478 U.S. 1021 (1986). By analogy, when private actors sponsor candidate debates (or televised weekly panel discussions), their editorial choice of program form and content is at least as expressive in character, and at least as close to the core of the First Amendment's concern for journalistic freedom, as a cable operator's selection of programming channels for carriage, which the Constitution protects. See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 636-641 (1994); see also *Denver Area Educ. Telecommunications Consortium, Inc.* v. *FCC*, 116 S. Ct. 2374, 2386-2388 (1996) (plurality opinion); *id.* at 2423-2425 (opinion of Thomas, J.); see generally *Rosenberger*, 115 S. Ct. at 2548 n.11 (Souter, J., dissenting).

Outside the broadcasting context as well, the First Amendment permits a state actor, *inter alia*, to structure a focused presentation for a discrete public purpose by selecting some private individuals, but not others, to participate in the presentation by giving their own disparate views on given subjects. For example, in sponsoring a lecture series, a state university may invite outside speakers to give a diversity of opinions on a topic without thereby bestowing on individuals with additional (or contrary) opinions a constitutional right of access to the podium. See *Widmar*, 454 U.S. at 276-277; see also

Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260, 267-273 (1988); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967) (denying claim of First Amendment right to publish article in law review issued by state university), cert. denied, 390 U.S. 920 (1968). Similarly, in structuring a ceremony to commemorate the anniversary of a historical event, the federal government may select private speakers to give a range of viewpoints on that event—which may or may not coincide with any official government position—without thereby incurring an obligation to ensure that all available viewpoints are represented. And the government may select certain individuals to create a public mural or monument that reflects some, but not all, views on a topic such as the Holocaust. Cf. *Piarowski* v. *Illinois Community College*, 759 F.2d 625, 631-632 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

The principal legal constraints on the news programming of a state-entity broadcaster therefore derive not from the First Amendment, but from the Communications Act, which directs all broadcasters, public and private, to exercise reasonable editorial discretion in serving the public interest. See *CBS, Inc.*, 412 U.S. at 124-125. And, as interpreted by the Commission, the Act also provides, in some circumstances, administrative remedies to candidates who can show that a broadcaster's news coverage is so arbitrarily neglectful of or hostile to their candidacies that it does not constitute a reasonably based, good-faith exercise of journalistic judgment.[7]

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[7] See pp. 5-6, *supra*. In his amended complaint, respondent noted the "equal opportunities" provision of 47 U.S.C. 315(a), see J.A. 27, but he did not squarely contend that Section 315(a) entitled him to participation in the debate, see *ibid.*;

But the First Amendment provides no basis for subjecting the editorial discretion of state-entity licensees and programming networks to greater scrutiny than the discretion of their counterparts in private commercial broadcasting.

The court of appeals' decision appears to rest, at least in part, on the concern that, in the absence of First Amendment constraints, a state-entity broadcaster might arbitrarily discriminate against "all Republicans" or "all Methodists" in its choice of debate participants. Pet. App. 34a; see also *id.* at 4a (permitting state-entity licensee to exclude non-major candidates from debate would "place too much faith in government"). That concern is misguided. As an initial matter, such discrimination would subject any broadcaster, public or private, to administrative measures under the Communications Act. See pp. 5-6, *supra*; see also note 3, *supra*. Even in the absence of those statutory protections, however, the actions of a state-entity broadcaster, like all actions of any state actor, "must be sufficiently reasonable to satisfy the Due Process Clause and cannot unfairly discriminate in violation of the Equal

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instead, he appeared to argue only that Section 315(a) entitled him to airtime on petitioner's stations for other purposes (such as airing an anti-abortion advertisement). See Pet. App. 31a. In any event, the court of appeals correctly denied his claim under Section 315(a) because he had failed to exhaust his administrative remedies before the FCC. *Ibid.* As discussed above (see p. 5, *supra*), Section 312(a)(7) of the Communications Act independently requires broadcasters to sell or donate airtime for use by federal political candidates. See 47 U.S.C. 312(a)(7); *CBS, Inc.* v. *FCC*, 453 U.S. 367 (1981). Respondent has raised no claim under that provision, which in any event has no relevance to a broadcaster's choice of political *programming*.

Protection Clause." *Southeastern Promotions*, 420 U.S. at 572 n.2 (Rehnquist, J., dissenting). Invidious discrimination against "all Republicans" or some other group, detached from any legitimate journalistic purpose, would lack a rational basis and would be constitutionally invalid on that ground alone. Cf. *ibid.* (even in absence of First Amendment constraints, "[a] municipal auditorium which opened itself to Republicans while closing itself to Democrats would run afoul of the Fourteenth Amendment").

c. Not only do First Amendment principles give private individuals no right to appear on public television, but they in fact counsel strongly against recognizing any such right. As this Court has held, the "First Amendment goal of producing an informed public capable of conducting its own affairs," *Red Lion*, 395 U.S. at 392, is better served not by granting private individuals rights of access to the airwaves, but by respecting the "journalistic discretion of broadcasters in the coverage of public issues." *CBS, Inc.*, 412 U.S. at 124; see also *League of Women Voters*, 468 U.S. at 398.

State-entity broadcasters and programming networks may effectively exercise that discretion only if they, like all other broadcasters and programmers, are permitted to structure their news programming without fear that aggrieved parties will sue to challenge the details of that programming as the products of unconstitutional editorial criteria. Cf. *CBS, Inc.*, 412 U.S. at 127 (rejecting "right-of-access" interpretation of Communications Act that would require "a continuing case-by-case determination of who should be heard and when"). Journalism inevitably requires difficult judgments about content, and no journalist

can cover all viewpoints on all topics. Subjecting the editorial decisions of public broadcasters to case-by-case scrutiny for content- or viewpoint-neutrality under "forum" analysis, see *Rosenberger*, 115 S. Ct. at 2517, could seriously discourage such broadcasters from providing full coverage of political contests.

Carried to its logical conclusion, the court of appeals' contrary approach would invite constitutional litigation concerning not just political debates aired by state-entity licensees and programming networks, but also a broad range of other news programming that has traditionally fallen within every broadcaster's editorial discretion. For example, any state-entity broadcaster or programming network that airs an interview with a political candidate as part of its nightly news coverage could arguably be required, under the Eighth Circuit's reasoning, to air a separate interview of every rival candidate who seeks equal public exposure.[8] Moreover, the Eighth

[8] While the petition for certiorari in this case was pending, the Eighth Circuit agreed to en banc consideration of whether a state-entity licensee may sponsor and air news programs featuring interviews with the "major candidates" for political office. See *Marcus* v. *Iowa Pub. Television*, No. 96-3645SIDM (Dec. 10, 1996). A divided panel of the Eighth Circuit had earlier denied preliminary injunctive relief to non-major candidates who sought to appear on those programs; it reasoned that, even if the programs at issue are limited public forums, the state-entity licensee likely has a "compelling interest" in "limiting access to newsworthy candidates." *Marcus* v. *Iowa Pub. Television*, 97 F.3d 1137, 1144 (1996). In analysis that a dissenting judge characterized as an effort "to distinguish the indistinguishable," *ibid.* (Beam, J., dissenting), the panel majority explained its tentative departure from the decision in this case on the ground that, "[u]nlike 'viability,' which is ultimately for the voters to decide, 'newsworthiness' is peculiarly a

Circuit's reasoning would also seem to grant rights of television access not just to uninvited candidates, but to anyone with a view about a matter of public controversy. If, as the court of appeals believed, "journalistic judgment[s] routinely made by newspeople" cannot be entrusted to "employees of government" (Pet. App. 16a), then, arguably, anyone could demand airtime to respond to the views expressed by anyone else interviewed in a news program, or featured in a panel discussion, sponsored by a state-entity licensee or programming network.

Even if confined to the context of candidate debates, however, the court of appeals' approach would harm public awareness of, and discussion about, political contests throughout the United States. The value of a debate does not necessarily increase with the number of participants; as common sense suggests, the inclusion of too many participants could make almost any debate unwieldy and uninformative. As a practical matter, the Eighth Circuit's approach could well lead many state-entity broadcasters simply to abandon plans to sponsor candidate debates. For example (see Pet. 11), the Nebraska Educational Telecommunications Network canceled a 1996 senatorial debate because it feared that, under the decision below, it would have to invite all minor candidates who wished to appear alongside the major contenders. Such consequences are unfortunate: not just for state-entity licensees themselves, but, more significantly, for the innumerable American citizens who

decision within the domain of journalists." *Id.* at 1142. On March 24, 1997, the Eighth Circuit deferred further consideration of *Marcus* until after this Court's final disposition of this case.

rely on such licensees to sponsor televised debates among the principal candidates for federal, state, and local offices.

II. EVEN IF "FORUM" ANALYSIS WERE APPLICABLE TO THE EDITORIAL DECISIONS OF STATE-ENTITY BROADCASTERS, PETITIONER'S REASONABLE, VIEWPOINT-NEUTRAL CHOICE OF DEBATE PARTICIPANTS STILL WOULD HAVE BEEN CONSTITUTIONAL

As a general matter, "forum" analysis imposes constitutional constraints on government regulation of private expression on (or by means of) public property that the government does not itself seek to use as the site or medium of its own expressive presentation to the public. See generally *Perry Educ. Ass'n*, 460 U.S. at 45-46. The most basic distinction drawn in this area is between "traditional" public forums, in which the government may not regulate on the basis of speech content without a compelling state interest, and "nonpublic forum[s]," in which speech "can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n*, 460 U.S. at 46).

Similar to "nonpublic" forums are forums "limited" to certain subjects or groups; there too, non-viewpoint-based "content discrimination * * * may be permissible if it preserves the purposes of th[e] limited forum." *Rosenberger*, 115 S. Ct. at 2517; see also *Perry Educ. Ass'n*, 460 U.S. at 46 n.7. "Limited" public forums are a subset of "designated" public forums, and should be distinguished from other

kinds of designated forums that are not so limited, such as historically closed government property that the government has "generally open[ed] to the public" as "a place for expressive activity" of all kinds. *Id.* at 45. Speech restrictions in that latter category of "designated" public forum, unlike speech restrictions in forums "limited" to certain topics or groups, are generally subject to the same strict content-neutrality requirement applicable to truly traditional public forums such as streets and sidewalks. See *id.* at 45-46 & n.7; *Cornelius*, 473 U.S. at 802; cf. *Denver Area*, 116 S. Ct. at 2388-2389 (plurality opinion); *id.* at 2413-2414 (opinion of Kennedy, J.).

Because the First Amendment has no application to the editorial choices that define a state-entity broadcaster's news programming, this case can and should be decided without reference to "forum" analysis. That analysis, as we have observed (see p. 16, *supra*), is applicable only where the government passively permits the use of its property to "encourage a diversity" of private views, see *Rosenberger*, 115 S. Ct. at 2519; but it is inapplicable in (for example) the circumstances presented here, in which a state actor designates private speakers to participate in a focused presentation that the state actor itself has designed for a discrete public purpose and over which it exercises close editorial control.

Nonetheless, even if "forum" analysis were applicable in this context, which it is not, then—whether this candidate debate is properly characterized as a "limited public" or as a "nonpublic" forum—petitioner's choice of debate participants still would have been constitutional. The court of appeals not only acknowledged that petitioner's decision to exclude respondent from the debate was "exactly the kind of

journalistic judgment routinely made by newspeople," Pet. App. 16a, but further accepted the jury's determination that petitioner's decision was not influenced by political pressure and was not "based on disagreement with [respondent's] political viewpoint," *id.* at 9a.

Thus, under the facts embraced by the court of appeals, petitioner's choice of participants was viewpoint-neutral (and arguably content-neutral as well) and reasonably calculated to preserve the character of the debate. Petitioner created the debate as an efficient means for community viewers to learn more about the candidates who, with the election drawing near, had attracted significant public interest or support; and to that original and entirely legitimate purpose petitioner remained faithful. See generally *Buckley* v. *Valeo*, 424 U.S. 1, 96 (1976) (per curiam) ("Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support.") (citation omitted); see also *Denver Area*, 116 S. Ct. at 2414 (opinion of Kennedy, J.). A state actor need show no more to justify speech regulations designed "to preserve the limits of the forum it has created." *Rosenberger*, 115 S. Ct. at 2517 (speech restrictions in limited public forum must be viewpoint-neutral and "reasonable in light of the purpose served by the forum"); *id.* at 2547-2549 (Souter, J., dissenting); accord *Perry Educ. Ass'n*, 460 U.S. at 46 & n.7;

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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